In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES *v.* THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS.	No. 338.
THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS *v.* THE UNITED STATES.	No. 339.

APPEALS FROM THE COURT OF CLAIMS.

SUPPEMENTAL BRIEF FOR THE UNITED STATES.

The claimants have filed a reply brief in this case in which they have elaborated somewhat upon their previous arguments, but have, so far as we have been able to observe, added nothing new to the facts contained in their original brief; and were it not that they have attempted, in their closing pages, to place an unwarranted construction upon Article III of the agreement of December 12, 1889 (26 Stat., 1037), we would still consider it unnecessary to add anything to what we have already said in this case.

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Their misconception of the significance of the language used in that agreement arises either from the fact that they have failed to examine, or failed to grasp, the true meaning of the report of the Committee on Indian Affairs of the House of Representatives, adopted by Congress and the claimants in the article in question; for, had they done so, we venture the assertion that what they have said under the heading " The doctrine of surcharging and falsifying an account stated " (Claimants' reply brief, pp. 49–56) would never have been written. The article of agreement reads as follows:

ARTICLE III.

> The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people, when at war with the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been wrongfully and unjustly deprived by the operation of the provisions of an Act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An Act for the relief of persons for

damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians;" said sum being at the rate of eighteen thousand and four hundred dollars per annum from July first, eighteen hundred and sixty-two, to July first, eighteen hundred and eighty-eight, less their pro rata share of the sum of six hundred and sixteen thousand and eighty-six dollars and fifty-two cents, heretofore appropriated for the benefit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians, as set forth in report numbered nineteen hundred and fifty-three, of the House of Representatives, Fiftieth Congress, first session.

The United States further agrees to pay to said bands of Indians, per capita, the sum of eighteen thousand and four hundred dollars annually from the first day of July, eighteen hundred and eighty-eight, to the first day of July, nineteen hundred and one, the latter date being the period at which the annuities to said bands of Indians were to cease, under the terms of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, aforesaid: and it is hereby further stipulated and agreed that the aforesaid sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, due the first day of July, eighteen hundred and eighty-nine, shall become immediately available upon the ratification of this agreement.

Concerning this article the claimants say (Reply brief, p. 50): "The nearest approach to an account stated between the appellant Indians and the United States is found in Article III of the agreement of 1889, approved by act of Congress of March 3, 1891 (26 Stat., 1037)." The claimants then proceed upon the authority of the third article of the treaty alone to state an account between the United States and themselves, taking as the basis of their computations the sum of $616,086.52, which, according to the third article of the agreement, had been theretofore appropriated for the benefit of the Sisseton and Wahpeton bands of Dakota or Sioux Indians. They have not, apparently, examined the report referred to in the agreement as No. 1953 of the House of Representatives, Fiftieth Congress, first session, in order to ascertain the various items of which the sum above referred to has been made up.

This report embodies a report of the Secretary of the Interior, inclosing a report of the Commissioner of Indian Affairs upon House bill 6464, Fiftieth Congress, first session, entitled "A bill for the relief of certain Indians who served in the armies of the United States against their own people, when at war with the United States, and of their families and descendants from the operation of certain acts of Congress passed to punish the hostile Indians." For the convenience of the court, the bill and committee report have been attached as

Appendix D and Appendix E, respectively, to this brief.

The bill was introduced for the relief of those members of the Sisseton, Wahpeton, Medawakanton, and Wahpakoota bands who were enrolled and served as scouts in the United States service against their own people after the massacres of August, 1862. It excepted in express terms such individual members of those bands from the operation of the forfeiture act of February 16, 1863, discussed in our original brief, and directed the Secretary of the Interior to carry into effect the treaties of July 25, 1851, and June 19, 1858 (with the upper bands), and August 5, 1851 (with the lower bands), as to such scouts and the members of their respective families who remained friendly to the whites and within the lines of the Federal Army to the same manner and to the same extent as if the forfeiture act had not been passed.

The second section of the bill directed that an account should be stated with the scouts, and that "there shall be deducted from the aggregate amount found due them, respectively, all such sums as may have been paid over to such Indian or Indians on any account whatever by the United States, except on account of actual services rendered to the United States between the sixteenth day of February, eighteen hundred and sixty-three, and the date to which said account is stated."

The Secretary of the Interior in his report, in accordance with what he deemed the intent of the bill, exempted those members of the Sisseton and Wahpeton bands who had enlisted as scouts in the United States Army—and he says " none of the other bands did so enlist "—from the operation of the act of February 16, 1863, the forfeiture act, and did not charge them with any of the amounts appropriated for removals, subsistence, clothing, or damages, as set out in Senate Document No. 68, Appendix A (statement No. 10, p. 20), except $42,-991.50 out of the appropriation of $100,000 by the act of March 3, 1885. (23 Stat., 344.) He charges them, however, with the appropriations made under the sixth article of the treaty of February 19, 1867, discussed in our original brief as item 7 (pp. 47–52); with the whole of the amount appropriated by the act of May 16, 1874, $70,000, discussed in our original brief as item 9 (pp. 52, 53), and certain sums appropriated as gifts by Congress from 1884 to 1888, inclusive, amounting to $35,637.77; the four items aggregating $616,086.52. (Appendix E, pp. 27, 28.)

If we should now accept the figures reached in Report No. 1953 as the amount of the appropriations for the claimants for the twenty-five years from the act of February 16, 1863, to the date of the account stated by the Secretary of the Interior, March 22, 1888, in said report, there should, of course, be added $581,917.37 paid to scouts and

soldiers under the agreement of December 12, 1889, and $206,353.30 paid to them under subsequent acts. There should also be added in making up the entire account the amounts expended under and in pursuance of the treaty of July 23, 1851, prior to the date of the forfeiture act of February 16, 1863; and in view of the fact that the acts conferring jurisdiction upon the Court of Claims in this case do not provide for the exemption of the claimants from the operation of the act of February 16, 1863, as was done by House bill 6464 for the scouts, which provided that the forfeiture act should " not extend to any individual Indians of the said Sisseton, Wahpeton, Medawakanton, and Wahpakoota bands of the Dakota or Sioux Indians who, in the war following the outbreak of said bands in August, 1862, enrolled themselves and entered the military service of the United States as scouts," etc., all of the amounts appropriated and expended under and in pursuance of the provisions of the said forfeiture act should also be charged against the claimants in making up said account. So that a correct account stated between the claimants and the United States in accordance with the letter and spirit of Report No. 1953 by the Committee on Indians Affairs of the House of Representatives, which was adopted by the Government, and the claimants in Article III of the treaty of December 12, 1889, would be made up as follows:

CREDITS.

By 50 installments of $73,600, annual interest, treaty of July 23, 1851 (10 Stat., 949)	$3,680,000.00
By amount allowed chiefs for removal and subsistence of claimants by said treaty	275,000.00
By amount appropriated for manual labor schools, mills, shops, etc.	30,000.00
	3,985,000.00

DEBITS.

Item.		
1. To 12 installments of annual interest appropriated under treaty of 1851 (10 Stat., 949), prior to outbreak, less $122,404.46 appropriated but unexpended at date of forfeiture act of February 16, 1863 (12 Stat., 652), and $104.66 returned to the United States Treasury	$760,690.88	
2. To amount paid to chiefs for removal, etc., and manual labor schools, etc., under treaty of 1851	305,000.00	
3. To balance of 12 appropriations made prior to outbreak, and unexpended at date of forfeiture act, and paid for damages, supplies, etc., under forfeiture act	122,404.46	
4. To one-half of advance annuity of $100,000 for 1864, appropriated by forfeiture act of February 16, 1863, and expended for damages under forfeiture act	50,000.00	
5. To one-half of the amount expended for damages, subsistence, removals, clothing, etc. ($1,778,709.48), appropriated by acts subsequent to the forfeiture act, less $42,991.50 charged against claimants out of appropriation of $100,000 made by act of March 3, 1885 (23 Stat., 344). (See S. Doc. 68, p. 20)	846,363.24	

6. To amount charged against claimants (leaving out of account the amounts chargeable under the forfeiture act of February 16, 1863), in the account stated in the report of the Committee on Indian Affairs of the House of Representatives. (Report No. 1953, 50th Cong., 1st sess.)	$616,086.52	
7. To amount paid to scouts and soldiers under agreement of December 12, 1889 (26 Stat., 1038)	581,978.37	
8. To amount paid to Sisseton and Wahpeton scouts and soldiers (26 Stat., 1038; 27 Stat., 624; 28 Stat., 889)	206,353.30	
		$3,488,876.77
Balance due, if account stated in House Report No. 1753, Fiftieth Congress, first session, be accepted as correct		496,123.23

A comparison of the above account with that rendered by the Interior Department and filed in this case and adopted by us (Defendants' original brief, pp. 23, 24, and Appendix C) will disclose the fact that the balance in favor of the claimants would be $82,669.22 less than the account for the correctness of which we are now contending. This difference in amount is easily explainable. The report of the Committee on Indian Affairs (Appendix E) was made up between the upper and lower bands together and the United States, and when an attempt was made to separate, in the same report, the account of the upper bands, the Sisseton and Wahpeton, some confusion resulted.

Senate Document No. 68 (Appendix A) is the report of the Secretary of the Interior, made ten

years later in pursuance of an act of Congress, and states in detail an account between the Sisseton and Wahpeton bands and the United States, and it was upon this document that the account of the Secretary of the Interior, to which we have referred, was based. Senate Document No. 68 has also been made a part of Finding VIII of the Court of Claims (Rec., pp. 11, 12), and should have therefore been printed as a part of the transcript.

The account rendered by the Secretary of the Interior, for the correctness of which we contend, charges $464,953.40, appropriated under the treaty of February 19, 1867, instead of $467,457.25, under the same treaty in Report No. 1953; and under the act of May 16, 1874, $25,472.30 instead of $70,000, under said report; and under the act of March 3, 1885, $50,000, instead of $42,991.50 (Defendants' original brief, pp. 11, 23, 24, 47–53; Statement 10, p. 20, Appendix A); and no charge has been made for gifts, while in Report No. 1953 $35,637.77 has been charged against the claimants as gifts from 1884 to 1888. A comparison of these items substantially explains the difference in the balance in favor of the claimants in the two accounts.

While we did not refer to the above report of the Committee on Indian Affairs of the House of Representatives (No. 1953) in our original brief, because we were convinced that we were limited to Senate Document No. 68 by the finding of the lower

court, we are nevertheless satisfied, since the report of the committee has been forced upon our attention, that every point for which we have contended in this case will be more firmly established by its consideration.

First, it was evidently intended by Congress and the claimants when they adopted Report No. 1953 that only those individuals who served as scouts and soldiers should be exempted from the operation of the forfeiture act, and should be paid in full their proportion of the annuities under the treaties of 1851 and 1858. The act of February 16, 1863, was repealed as to that class, and of those transactions which were passed and closed the amounts appropriated under and in pursuance of that act were excepted from the amounts to be charged against them. As to all other transactions passed and closed and all other parties the act remained in full force and effect.

The language of the bill (House bill 6464) establishes beyond controversy the contention of the defendants in their original brief (pp. 26–29, 34, 35, 36, 41–47) that one-half of the appropriations made by the acts set out in statement No. 10, Senate Document No. 68 (p. 20, Appendix A), are properly chargeable against the claimants.

The adoption of Report No. 1953 by both of the parties to this suit, in the agreement of 1889, also establishes more firmly the contention of the defendants in their original brief (item 7, pp. 47–52)

that the appropriations made by the various acts in pursuance of the treaty of February 19, 1867, were properly chargeable to the claimants.

The adoption of the report also establishes more firmly the contention of the defendants in their original brief (item 9, pp. 52, 53) that the amount expended for the claimants under the act of May 16, 1874, is properly chargeable against them.

The adoption of the report, and the language used therein, that only the Sisseton and Wahpeton bands enlisted as scouts in the United States Army, and that " none of the other bands did so enlist," establishes more firmly the contention of the defendants (item 5, pp. 36–41) that all of the amounts appropriated by the acts set out in statement No. 7, Senate Document No. 68 (p. 19, Appendix A), should be charged against the claimants.

The claimants have by a very ingenious mathematical process attempted to account for the reasoning by which Congress arrived at the sum of $342,778.37 in Article III of the treaty of December 12, 1889, as the amount due to the scouts and soldiers up to 1888, for their lands ceded by the treaty of July 23, 1851. The only difficulty, however, with their method is that they have reasoned from effect to cause, instead of from cause to effect; or in other words, like certain schoolboys they have forced the answer. The method by which the amount in question was really arrived at in the account stated by the Commissioner of Indian Affairs, transmitted by the Secretary of the Interior

(Report No. 1953), is as follows: He has multiplied the amount of annuities, $73,600, by the number of years that have elapsed from the date of the act of February 16, 1863, up to the date of the account, twenty-five years, making in gross $1,840,000, and has subtracted therefrom the sum of $616,086.52 (arrived at as before stated), leaving $1,223,913.48, one-fourth of which, $305,978.37, would be the amount to which the scouts and their families would be entitled to, and this amount he recommended to Congress for appropriation. The Committee on Indian Affairs, in its Report No. 1953, recommended that the individual members of the Sisseton and Wahpeton bands who had served in the armies of the United States in the rebellion should also be included, and that the amount due them, $36,800, should also be appropriated, which was done, making up the amount set out in the agreement of 1889.

The scouts and soldiers of the Sisseton and Wahpeton bands received every cent to which they were entitled for the cession of their lands by the treaty of July 23, 1851, and the acts of Congress by which the appropriations in their favor were made provided that they should be in full settlement of all of their claims for annuities. The payments were made to them not because they did not participate in the outbreak, but because, in the opinion of Congress, they had rendered services after the outbreak which entitled them to relief from the forfeiture act. The Secretary of the Interior in his report said: " Let us agree to class all of these bands as

hostile at the time of the outbreak, concede that their lands were justly confiscated, but that those who were in the service in the Army as scouts, as appears from the records of the War Department, should be classed as our friends, and should be exempted from the act of confiscation." (Report No. 1953.)

The first time the question of the participation of the claimant bands ever came up for judicial determination was when the claim was referred to the Court of Claims by special act of Congress, in which nonparticipation of the bands in the outbreak was made a condition precedent to a consideration of the claim upon its merits, and the Court of Claims made a finding " that it was impossible from the evidence to determine what members of the claimant bands remained loyal to the United States during the hostilities in question." In its opinion that court said: "A careful analysis of the whole evidence of the case, however, compels us to say that all of the responsible members of the bands in question at some time during the perpetration of the outrages in one way or another aided, abetted, assisted, or encouraged therein, or in some of them, if they did not actually participate therein." (39 C. Cls., pp. 175, 176.) The petition was dismissed by the court.

Afterwards another special act was passed by Congress, amending the original act so as to give the Court of Claims jurisdiction to render judg-

ment, and the question of participation of the bands in the outbreak was eliminated from the jurisdiction of that court. The Secretary of the Interior was required, after the rendition of judgment, to prepare a roll of all members of the claimant bands living at the date of the passage of the act, eliminating therefrom all members who had participated in the outbreak, and that he should distribute to the persons on said roll the amount of the judgment *per capita*. The Court of Claims rendered judgment for $788,971.53, and again made the finding above referred to (No. 2, p. 9), that it was unable to determine from the evidence the individual members who had remained loyal.

The roll which the Secretary of the Interior has been directed to prepare, upon the rendition of final judgment in the case, will embrace all those members of the claimant bands who did not participate in the outbreak, except scouts and soldiers. It will embrace the innocent children of the guilty as well as the innocent children of the innocent, and those who will participate in the distribution of the judgment will receive by reason of the elimination of the guilty a larger share than they would otherwise have received. All those who have rendered services to the Government have already received their full share of the unpaid annuities.

In view of these facts it is no more than just and reasonable that the guilty and those who have received more than they would otherwise have re-

ceived for their lands should bear the burden of the losses arising out of the damages committed by the bands rather than the Government, which was required to expend an immense sum of money in suppressing the outbreak; and Congress has evidently taken this view of the matter and left the burden where it properly belongs.

JOHN Q. THOMPSON,
Assistant Attorney-General.
GEORGE M. ANDERSON,
Special Attorney.

APPENDIX D.

H. R. No. 6464, Fiftieth Congress, First Session.

A BILL For the relief of certain Indians who served in the Armies of the United States against their own people, when at war with the United States, and of their families and descendants, from the operation of certain acts of Congress passed to punish the hostile Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Acts of Congress entitled "An Act for the relief of persons for damages sustained by reason of depredations and injuries by certain bands of Sioux Indians, approved February sixteenth, eighteen hundred and sixty-three," shall not extend to any individual Indians of the said Sisseton, Wahpeton, Medawakanton, or Wahpakoota bands of the Dakota or Sioux Indians who, in the war following the outbreak of said bands in August, eighteen hundred and sixty-two, enrolled themselves and entered into the military service of the United States as scouts, and as scouts served against said hostile Indians thereafter in said war under the direction and command of Brigadier General Henry H. Sibley or other commanding officers of the United States forces in the district of Minnesota during said war, and that the Secretary of the Interior be, and hereby is authorized and directed to carry into effect as to the Indians who so enrolled and served as scouts, together with the members of their respective families who remained friendly to the whites and within

the lines of the Federal Army, all of the provisions of the treaties of July twenty-third, eighteen hundred and fifty one, and August fifth, eighteen hundred and fifty one and June nineteenth, eighteen hundred and fifty-eight, in the same manner and to the same extent as if the act of February sixteenth eighteen hundred and sixty-three had never been passed.

SEC. 2. That in stating the accounts under said treaties with said individual Indians, there shall be deducted from the aggregate amount found due them respectively all such sums as may have been paid over to such Indian or Indians on any account whatever by the United States, except on account of actual services rendered to the United States between the sixteenth day of February, eighteen hundred and sixty-three, and the date to which said account is stated.

SEC. 3. That to enable the Secretary of the Interior to carry into effect the foregoing provisions of the act, there be, and is hereby, appropriated, out of any money in the Treasury not otherwise appropriated, two hundred and fifty thousand dollars, or as much thereof as may be necessary.

SEC. 4. That this act shall take effect and be in force from and after its passage.

APPENDIX E.

House Report No. 1953, Fiftieth Congress, First Session.

The Committee on Indian Affairs, to whom was referred the bill (H. R. 6464) for the relief of certain Sisseton and Wahpeton Sioux Indians who served in the armies of the United States against their own people, respectfully report the following statement of facts, as set forth in the letters of the honorable Secretary of the Interior and from the honorable Commissioner of Indian Affairs, together with letters from General Sibley and Bishop Whipple, who were personally acquainted with the facts herein set forth; also a letter from Sarah Goodthunder to Bishop Whipple, which makes its own unexpressed but most pathetic plea for the relief asked for in this bill for those who lost everything in their devotion to the whites, and who have so long suffered from the wrongs we have inflicted upon them.

We also give a detailed statement of the obligations we were under to these people and of the manner in which they were cruelly deprived of these rights, and respectfully submit that the remedy proposed in this bill is not what strict justice demands. The bill submitted by the Department as a substitute for bill H. R. 6464 we have amended so as to include as beneficiaries of this act, with those who served as scouts in the armies acting against the Sioux, members of the same bands who were at the time of the outbreak serving in the

armies of the United States in the war of the rebellion. We also think that the bill should be so amended as to provide for twenty-seven annual payments, and not for twenty-five, as recommended by the Department; for the payments of 1862 and 1863 were never made to them, the outbreak occurring in August of 1862, before the money, which was on the road for the purpose, reached the reservation, and that appropriated for the year 1863, before the outbreak occurred, was covered back into the Treasury, so the amount appropriated for the payment of these scouts and soldiers should include their pro rata share in the payments due for those two years, which would be $36,800.

We recommend that the bill so amended do pass.

DEPARTMENT OF THE INTERIOR,
Washington, March 24, 1888.

SIR: I have the honor to acknowledge the receipt of your communication of 15th ultimo, inclosing, with request for information, H. R. 6464, "For the relief of certain Indians who served in the armies of the United States against their own people when at war with the United States, and of their families and descendants, from the operation of certain acts of Congress passed to punish hostile Indians."

In response thereto I transmit for your information a copy of a report of the 22d instant from the Commissioner of Indian Affairs, to whom the matter was referred, wherein he gives a brief history of the Sisseton, Wahpeton, Medawakanton, and Wahpakoota bands of the Dakota Sioux Indians, whose treaties were abrogated, and the lands, annuities, and claims declared forfeited by the act of February 16, 1863 (12 Stat., 652), on account of the outbreak and massacre of whites in Minnesota in the fall of 1862 by parties of said Indians; furnishes information of record showing the

friendly attitude toward the whites and the good conduct at that time by parties of the Sisseton and Wahpeton bands, and the valuable services rendered by some of them in the service of the United States as scouts, etc.

The report presents a statement of annuities provided for under the abrogated treaties amounting to a total annual sum of $150,050, of which $15,000 was payable forever and the remainder for fifty years; that prior to the abrogation of the treaties twelve installments of the annuities had been paid, from 1851 to 1863, leaving thirty-eight installments payable on all annuities, except the $15,000 payable forever, amounting in the aggregate for all, for the period of fifty years, to the sum of $5,701,900; that since the abrogating act of 1863 there has been paid, under laws and a subsequent treaty, for and on account of all these bands of Sioux Indians, the total sum of $4,813,064.54, leaving a balance of $888,835.46; that there has been received, in addition to the foregoing, on account of the proceeds of sales of their lands in Minnesota and Dakota, the sum of $889,081.90, of which $811,845.11 has been expended for the benefit of the Santee Sioux and Sioux of Lake Traverse and Devils Lake, leaving a balance to their credit of $77,236.79.

The report further shows that the share of the Sisseton and Wahpeton bands in the $150,050 annuity payment was $73,600, all of which was limited to the period of fifty years; that twenty-five installments from 1863 to 1888 would amount to $1,840,000, from which should be deducted the total amount expended for or on account of said two bands since 1863, $616,086.52, leaving a balance of $1,223,913.48. That the scouts and their families of the Sisseton and Wahpeton bands constitute one-fourth of the number of those Indians, and that therefore their proportion of the last-named sum would be $305,978.37, and for their benefit he recommends an appropriation of that sum in a bill which he has prepared and which is herewith submitted as a substitute for House bill 6464, stating that the second section of the latter bill is impossible of execution, as no accounts with the individual Indians have been or are kept.

The bill recommended by the Commissioner as a substitute for the House bill 6464 contains a provision for the annual appropriation of $18,400, for the period of thirteen

years from July 1, 1889, as the share of the annuities of the Indians for whose benefit this legislation is proposed, to which they would be entitled had their treaties not been abrogated.

Very respectfully, WM. F. VILAS.
Secretary.

CHAIRMAN COMMITTEE ON INDIAN AFFAIRS,
House of Representatives.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., March 22, 1888.

SIR: By your reference of the 16th ultimo, for report, I have the honor to be in receipt of a communication from the chairman of the House Committee on Indian Affairs, inclosing House bill 6464, "For the relief of certain Indians who served in the armies of the United States against their own people, when at war with the United States, and of their families and descendants, from the operation of certain acts of Congress passed to punish the hostile Indians."

The bill enacts that the provisions of the act of Congress entitled "An act for the relief of persons for damages sustained by reason of depredations and injuries by certain bands of Sioux Indians, approved February 16, 1863," shall not extend to any individual Indians of the said Sisseton, Wahpeton, Medawakanton, and Wahpakoota bands of the Dakota or Sioux Indians who, in the war following the outbreak of said bands in August, 1862, enrolled themselves and entered into the military service of the United States as scouts, and as such served against said hostile Indians thereafter in said war, under the direction and command of Brig. Gen. Henry H. Sibley or other commanding officers of the United States forces in the district of Minnesota during said war, and that the Secretary of the Interior be, and hereby is, authorized and directed to carry into effect as to the Indians who so enrolled and served as scouts, together with the members of their respective families who remained friendly to the whites and within the lines of the Federal Army, all the provisions of the treaties of July 25,

1851, and August 5, 1851, and June 9, 1858, in the same manner and to the same extent as if the act of February 16, 1863, had never been passed.

Section 2 provides that, in stating the accounts under said treaties with said individual Indians, there shall be deducted from the aggregate amount found due them, respectively, all such sums as may have been paid over to such Indian or Indians on any account whatever by the United States, except on account of actual services rendered to the United States between the 16th day of February, 1863, and the date to which said account is stated.

In order to understand the object of the legislation proposed by this bill it is necessary that a brief history of the four bands named, and of the sums guaranteed to them under their several treaties, should be detailed for the information of the Department and the House Committee on Indian Affairs.

Under treaty of September 29, 1837 (7 Stat., 539), with said Indians, the sum of $300,000 was set aside to draw interest at 5 per cent per annum, yielding an interest annually forever of	$15,000
By treaty of July 23, 1851 (10 Stat., 949), with the Sisseton and Wahpeton bands, as a consideration for the cession of lands, a trust fund was created, amounting to $1,360,000, yielding an interest of 5 per cent per annum for fifty years	68,000
By the Indian appropriation act of August 30, 1852 (10 Stat., 52), in accordance with the Senate amendment to said treaty, the sum of $112,000 was added to said trust fund, yielding an annual interest of	5,600
By treaty with the Medawakanton and Wahpakoota bands of Sioux, dated August 5, 1851 (10 Stat., 954), as a consideration for cession of lands, a trust fund was created amounting to $1,160,000, yielding an annual interest of (to be paid for 50 years)	58,000
By the Indian appropriation act of August 30, 1852 (10 Stat., 52), in accordance with Senate amendment to said treaty, the sum of $69,000 was added to said trust fund, yielding an annual interest of	3,450
Total annuity	150,050

Owing to the outbreak and massacre in Minnesota in the fall of 1862 Congress, by act approved February 16, 1863 (12 Stat., 652), declared all treaties with said bands abrogated, all lands in Minnesota, annuities, and claims

forfeited, and provided for a commission to ascertain and report upon claims for losses, and authority was given to the Interior Department to set apart 80 acres of land to such Indians as had exerted themselves to save captive whites. By the act of March 3, 1863 (12 Stat., 819), it was provided that a tract of good agricultural land should be set apart, outside of the limits of any State, sufficient for 80 acres to each member of the four bands who were willing to adopt the pursuits of agriculture; that their former reservation should be surveyed and sold and the proceeds invested by the Indian Department for the benefit of said Indians, and that Indians who had exerted themselves to save the lives of whites should each have 80 acres of land on which the improvements were situated.

Under the provisions of this act of Congress the four bands named were removed from Minnesota and are now located at the Santee Agency, Nebr., and at the Sisseton and Devils Lake agencies, in Dakota.

On the 19th day of February, 1867 (15 Stat., 505), a treaty was entered into with the Sisseton and Wahpeton bands of Sioux Indians, which recites as follows:

"Whereas it is understood that a portion of the Sisseton and Wahpeton bands of Santee Sioux Indians, numbering from 1,200 to 1,500 persons, not only preserved their obligations to the Government of the United States during and since the outbreak of the Medawakanton and other bands of Sioux in 1862, but freely periled their lives during the outbreak to rescue the residents on the Sioux Reservation and to obtain possession of white women and children made captives by the hostile bands, and that another portion of said Sisseton and Wahpeton bands, numbering from 1,000 to 1,200 persons, who did not participate in the massacre of the whites in 1862, fearing the indiscriminate vengeance of the whites, fled to the great prairies of the Northwest, where they still remain; and

"Whereas Congress, in confiscating the Sioux annuities and reservations, made no provision for the support of these, the friendly portion of the Sisseton and Wahpeton bands," etc.; and

"Whereas the several subdivisions of the friendly Sisseton and Wahpeton bands ask, through their representatives, that

their adherence to their former obligations of friendship to the Government and people of the United States be recognized, and that provision be made to enable them to return to an agricultural life, etc.:

Therefore, a treaty has been entered into at Washington City, this 19th day of February, 1867," etc.

Under article 2 of this treaty the said bands cede to the United States the right to construct wagon roads, railroads, mail stations, etc., over and across the lands claimed by said bands, including their reservation thereinafter designated.

Under articles 3 and 5: For and in consideration of the cession above mentioned, and in consideration of the faithful and important services said to have been rendered by the said bands, also in consideration of the confiscation of all their annuities, etc., a tract of land was set aside for a permanent reservation, beginning at the head of Lake Traverse, etc., to be apportioned in tracts of 160 acres to each head of a family.

Under amended article 6: In consideration of the destitution of said bands of Sisseton and Wahpeton Sioux, resulting from the confiscation of their annuities and improvements, it is agreed that Congress will, in its own discretion, from time to time make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life, to establish and support local and manual labor schools, to employ mechanical and other teachers, and to improve farms, etc.

Under this article of the treaty there has been appropriated for these bands the sum of $467,457.25.

As hereinbefore stated, these bands were to receive annually for fifty years the sum of $150,050.

At the time of the outbreak in 1862 twelve installments of annuity had been appropriated, leaving unappropriated thirty-eight installments of $150,050, aggregating the sum of		$5,701,900.00
Since the date of the act of February 16, 1863, the following sums have been appropriated for the support of these bands and to pay for damages to citizens, etc.:		
12 Stat., 652. For damages	$100,000.00	
12 Stat., 784. For removal, etc	50,016.66	
13 Stat., 172. For deficiencies, etc	113,043.40	
13 Stat., 92. Award for damages	928,411.00	
13 Stat., 92. Award for damages	241,963.00	

13 Stat., 427. For award to Indians	$7,500.00
13 Stat., 180. For support	100,000.00
13 Stat., 559. For support	100,000.00
14 Stat., 279. For support	100,000.00
14 Stat., 514. For support	100,000.00
Under treaty of 1867:	
15 Stat., 217. For support (D. L.)	35,000.00
15 Stat., 217. For support (L. T.)	30,000.00
15 Stat., 217. For support (L. T.)	7,457.25
15 Stat., 221. For support (L. T.)	50,000.00
15 Stat., 315. For support, both bands	60,000.00
16 Stat., 26. For survey of reservation	45,000.00
16 Stat., 88. For support	10,000.00
16 Stat., 353. For support	50,000.00
16 Stat., 354. For support	50,000.00
16 Stat., 563. For support	75,000.00
17 Stat., 183. For support	75,000.00
	2,308,391.31
18 Stat., 167. Add amount paid to Sisseton and Wahpeton and Santee Sioux of Lake Traverse and Devils Lake, under agreement made by commissioners appointed under act of June 7, 1872, with said bands for the relinquishment of their claim to or interest in land described in second article of treaty of February 19, 1867	800,000.00
15 Stat., 635. Add amount paid to the Santee Sioux Indians of the four bands named, under treaty with the different tribes of Sioux, dated April 29, 1868, for twenty years, say $75,000 per annum (which, under article 10, is in lieu of all annuities under former treaties)	1,500,000.00
18 Stat., 47. Add amount appropriated to pay creditors of said bands, by act approved May 16, 1874	70,000.00
19 Stat., 549. Add amount appropriated for relief of Hans C. Peterson, by act approved March 3, 1877	2,283.92
23 Stat., 344. Add amount expended of the sum of $100,000 appropriated by act approved March 3, 1885, to pay creditors of said Indians prior to the massacre of 1862	42,991.50
	4,723,666.73

Add amounts expended for support of said bands at Sisseton and Devils Lake for the fiscal year 1884	$15,934.60	
The fiscal year—		
1885	15,933.86	
1886	15,588.22	
1887	11,717.63	
1888	12,000.00	
For the Medawakanton band in Minnesota, fiscal year 1885	9,442.50	
For same band, for 1887	8,781.00	
		$4,813,064.54
Balance		888,835.46

In addition to the aggregate sum of $4,813,064.54, expended as shown above, there has been received from the sale of their lands in Minnesota and Dakota the sum of $889,081.90, of which amount the sum of $811,845.11 has been expended for the benefit of the Santee Sioux and Sioux of Lake Traverse and Devils Lake, leaving a balance to their credit of $77,236.79.

In stating the foregoing account, under bill 6464, this office dealt with the four bands mentioned in said bill in common, but it is claimed that relief is only sought for those members of the Sisseton and Wahpeton bands, their families and descendants, who enlisted as scouts in the United States Army (none of the other bands did so enlist), and who were under treaty entitled to an annual sum of $73,600 for fifty years, of which twelve installments had been appropriated, leaving thirty-eight installments due when the act of confiscation of February 16, 1863, was passed. Of the different amounts appropriated in the foregoing statements, the scouts claim only their share of the $467,457.25 appropriated under article 6 of the treaty of February 19, 1867, should be charged against them, as the other charges were for payment of damages arising from the massacre in 1862, and for feeding the Indians after the confiscation of their annuities, and while the scouts and families were at Fort Wadsworth in the employ of the Government. This office, however, is of the opinion that they should be charged, in addition to their share of the $467,457.25, with their share of the $70,000 appropriated May 16, 1874 (18 Stat., 47), and of the $42,991.50 used from the $100,000 appropriated March 3, 1885

(23 Stat., 344), as these amounts were used to pay debts prior to the massacre. They should also be charged with their share of the amounts appropriated by Congress as a gift from 1884 to 1888, inclusive, amounting to $35,637.77, making total amount to be charged against the Sisseton and Wahpeton bands of $616,086.52.

The bill as submitted provides in section 2 "That in stating the accounts under said treaties with said individual Indians, there shall be deducted from the aggregate amount found due them, respectively, all such sums as may have been paid over to such Indian or Indians on any account whatever by the United States, except on account of actual services rendered to the United States between the 16th day of February, 1863, and the date to which said account is stated."

This provision is impossible of execution, as no accounts with individual Indians are kept or can be kept, and I have prepared an amended bill, as will hereafter appear.

In reference to the foregoing account of moneys paid to and on account of the several bands of Sioux mentioned in the proposed bill (H. R. 6464), I can not refrain from saying that, in my estimation, legislation based upon it would, perhaps, perpetuate and make irremediable a great wrong which has been perpetrated upon the Sisseton and Wahpeton bands, who have been unfortunately and cruelly classed with the other named bands, the Medawakanton and Wahpakoota.

To make this clear the following statement of facts seems necessary:

At the time of the outbreak of the Lower Sioux, composed of the two bands last named, in Minnesota, in 1862, the first-named two bands, called also the Upper Sioux, were living on separate reservations, lying partly in Minnesota and partly in Dakota, secured to them by separate treaties, under which they were entitled to an annuity of $73,600 for fifty years, beginning July 1, 1852. Twelve installments had been appropriated, when, in 1862, the other bands organized an outbreak and massacre of white settlers in the vicinity of the reservation occupied by the friendly Sissetons and Wahpetons.

By act of Congress, February 16, 1863, in which the outraged feelings of the country, as well as its indiscriminating wrath, found expression, all treaties with the four bands

were abrogated, their lands in Minnesota and their funds were confiscated, although part of the Sisseton and Wahpeton bands remained loyal and enlisted in the Army.

In 1867 the Government, having been convinced that a great wrong had been done in the case of the Sisseton and Wahpeton bands, who not only had refrained from hostilities, but had periled their lives in defense of the whites and in delivering a large number of captive women and children who had been captured by the hostiles, appointed a commission to treat with these bands. This treaty, concluded February 19, 1867, in its preamble recites the fact that the act of February 16, 1863, had wronged these bands, and the third article, "for and in consideration of the faithful services said to have been rendered by them," and "in consideration of the confiscation of their annuities, reservations, and improvements," sets apart for the scouts and their families the Traverse Lake Reservation; and the fourth article, for the others, who fled from the hostiles to the north, the reservation of Devils Lake. This has been held to be in full satisfaction for the wrong done these Indians, and is cited as an estoppel, and admission on their part that full compensation has been received by them. But what did we give them by this treaty as a reward for their faithful services in which they had imperiled their lives; and in compensation for their annuities, which were confiscated; and for their crops, which our troops consumed, valued at $120,000; and for their valuable lands in Minnesota, from which they were driven; and for the right of way for roads through their lands in Dakota, which they ceded to us? What was the valuable consideration given to which we refer as compensation for all their loss and wrong? Simply the reservations in Dakota on which they live, which were theirs already. It will be seen from the statement submitted herewith that they have received more than they would have been entitled to receive under the abrogated treaty of 1851. But a glance at the items composing the accounts discloses the fact that this is because these bands are charged with support given the hostile bands and with damages inflicted by them. It is necessary to remember that a few of the hostile bands joined the friendly ones and furnished scouts who served with the others, and the purpose of the bill doubtless is to compensate

these as well as the others. By thus mentioning them w
the others, these others are held responsible for all that
been paid to and on account of the hostile bands.

It would be impossible at this late day to separate th
accounts, but I think the following proposition will sati
those for whose benefit legislation is sought.

Let us agree to class all these bands as hostile at the ti
of the outbreak, concede that their lands and funds w
justly confiscated, but those who were in the service in
Army as scouts, as appears from the records of the W
Department, should be classed as our friends, and should
exempted from the act of confiscation. If we multiply
amount of their annuities ($73,600) by the number of ye
that have elapsed (twenty-five), we have the gross sum
$1,840,000. From this subtract the amount which has b
appropriated for the whole number after the confiscat
act, amounting to $616,086.52, which leaves $1,223,913
The scouts and their families constitute one-fourth of th
who would have received this, and their share, therefo
would be $305,978.37.

I recommend that a bill be passed appropriating this s
of money to be paid to those whose names appear on the r
of the Army as scouts, their families and descendants,
their legal representatives; and that these bands be relie
from the stigma which has been unjustly put upon them
being hostile because a few of their young men joined
hostiles, and that they shall be so far restored to their rig
under the treaties and agreements which were abrogated t
they shall receive during the remaining thirteen years dur
which they are entitled to it the full one-fourth of the amo
of their annuities.

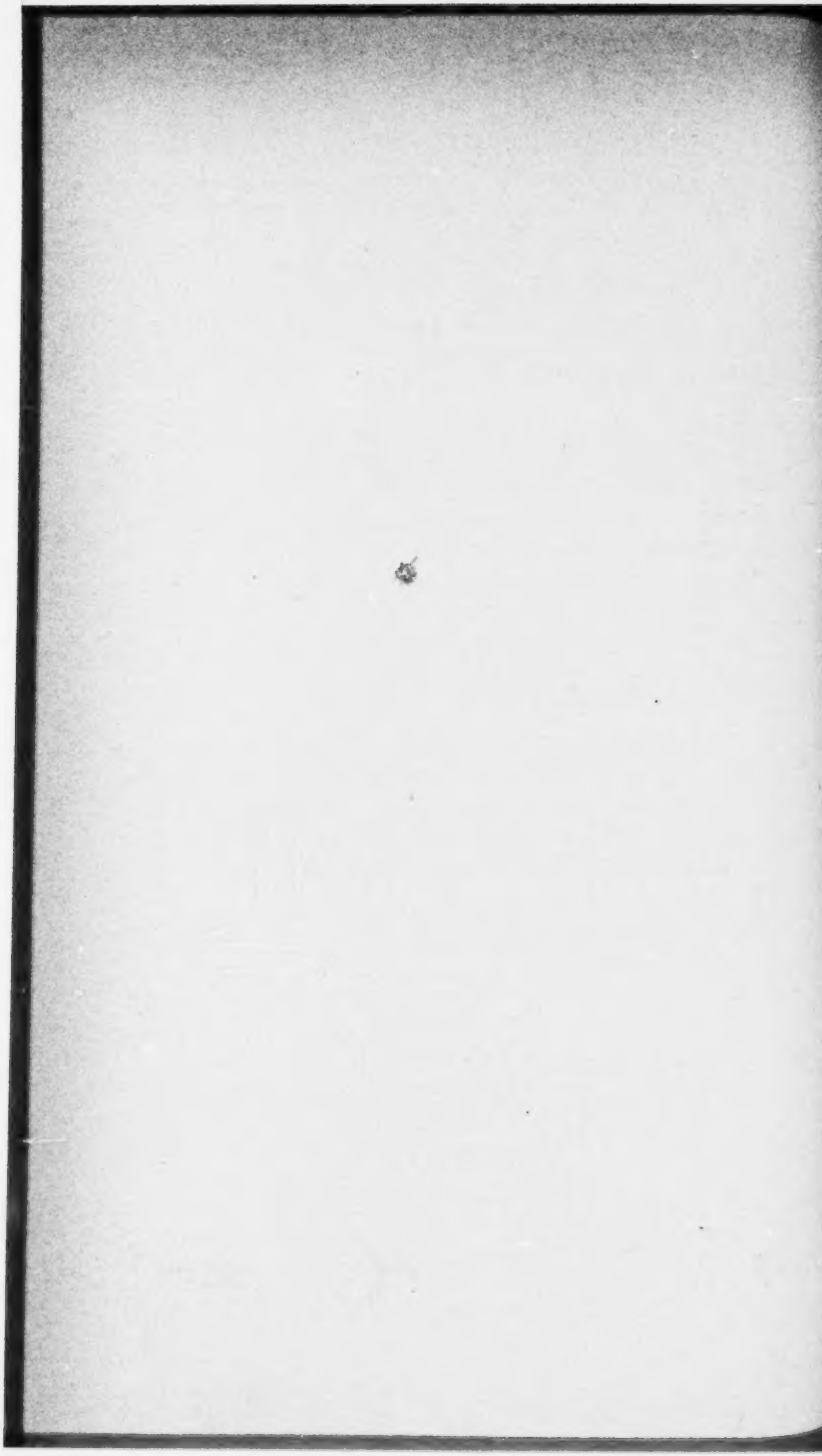
I inclose a draft of a bill, which I recommend be sub
tuted for House bill No. 6464, referred for report, and ret
also letter from Committee on Indian Affairs, House of R
resentatives, with accompanying papers.

Very respectfully,

J. D. C. Atkins,
Commissioner

The Secretary of the Interior.

O



JUL 29 1907
JAMES H. McKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES
v.
THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS. } No. 238.

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS
v.
THE UNITED STATES. } No. 239.

APPEALS FROM THE COURT OF CLAIMS.

Statement of the Case, Assignment of Errors, and Argument on Behalf of the Appellants, the Sisseton and Wahpeton Bands of Indians.

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Of Counsel.

PRESS OF GIBSON BROTHERS,
WASHINGTON, D. C.
1907.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES *v.* THE SISSETON AND WAPHETON BANDS OF SIOUX INDIANS.	*No.* 338.

THE SISSETON AND WAHPETON BANDS OF SIOUX INDIANS *v.* THE UNITED STATES.	*No.* 339.

APPEALS FROM THE COURT OF CLAIMS.

Statement of the Case, Assignment of Errors, and Argument on Behalf of the Appellants, the Sisseton and Wahpeton Bands of Indians.

STATEMENT OF THE CASE.

In consideration of the cession to the United States of certain lands, by treaty of July 23, 1851, proclaimed February 24, 1853 (10 Stats., 949), and in execution of that treaty, the United States became indebted to the appellant Indians for certain annuities, for a period of fifty years, commencing July 1, 1852, and terminating July 1, 1902.

In August, 1862, some of the appellant Indians engaged in an outbreak during which damage was inflicted upon settlers in the State of Minnesota. Thereupon, on February 16, 1863 (12 Stats., 652), Congress passed an act abrogating and annulling all treaties between the appellant Indians and the United States, so far as the said treaties or any of them purported to impose any future obligation on the United States, and declaring the annuities of appellant Indians forfeited.

At the date of forfeiture certain instalments of the annuities had been paid in full, leaving others unpaid.

The appellant Indians were, by the act of forfeiture, declared then to be in a state of war with the United States.

Thereafter, from time to time, Congress appropriated certain sums of money, being for gratuities to appellant bands, for considerations set out in treaties made with them or in statutes passed regarding them, or for various supports. Congress also provided certain sums for payment for damages alleged to have been committed by appellant bands and by United States troops.

By act of Congress approved March 3d, 1885 (23 Stat. L., 344), the forfeited annuities of appellant bands were restored in part and appropriated to pay certain debts due licensed traders, which was the first act restoring in part said annuities.

Under an agreement made in 1889, provision was made to restore in part the forfeited annuities supposed to represent the proportion of the annuities due those members of appellant bands who had served as scouts during the difficulties of 1862, or in the army of the United States. Congress ratified that agreement in 1891, and appropriated a sum of money to cover that portion of the annuities thus restored which had accrued up to date, and continued the payment of the same to the end of the fifty year annuity period.

Congress, in the same act, also appropriated in part the annuities of certain other scouts, who were not included in the agreement of 1889, and appropriated a sum of money to cover such restored annuities as had accrued up to the date thereof; and thereafter, in like manner, made other appropriations in payment of the same to the end of the fifty year annuity period.

At the end of the fifty year annuity period, by act of Congress approved March 3, 1901 (31 Stats. 1078) jurisdiction was conferred upon the Court of Claims to report to Congress what annuities provided by the treaty of 1851, would be due to the loyal members of appellant bands, if the act of forfeiture of February 16, 1863, had not been passed, and to ascertain and report to Congress what *lands, appropriations, payments, gratuities or other provisions* had been made to or for said bands of Indians, or to or for any members thereof, subsequent to the act of forfeiture.

The court found that it was its duty under this act to ascertain the loyal members *by name*, and that it was impossible from the evidence to do so. (Sisseton and Wahpeton Sioux *v.* United States, 39 C. C., 172). Whereupon, Congress, by act approved June 21, 1906 (Record, pages 5 and 6), conferred jurisdiction upon the Court of Claims to "Hear, determine and render final judgment

in said cause, for balance, if any is found due said bands, with right of appeal as in other cases, for any annuities which would be due to said bands of Indians under the treaty of July twenty-third, eighteen hundred and fifty-one (Tenth Statutes at Large, page nine hundred and forty-nine), *as* if the act of forfeiture of the annuities of said bands, approved February sixteenth, eighteen hundred and sixty-three, had not been passed; and to ascertain and set off against the amount found to be due to said Indians, if any, all payments or other provisions of every name or nature made to or for said bands by the United States, or to or for any members thereof since said act of forfeiture was passed, *which are properly chargeable against said unpaid annuities.*"

Appellant Indians brought their action within the provisions of the act of June 21, 1906, and upon the hearing thereof the Court of Claims awarded judgment to them in the sum of seven hundred and eighty-eight thousand, nine hundred and seventy-one dollars and fifty-three cents ($788,971.53), from which judgment appeal is taken to this court.

ASSIGNMENT OF ERRORS.

The Court of Claims erred:

I.

In failing to hold that the jurisdictional act approved June 21, 1906, annulled the act of forfeiture of February 16, 1863, and restored the treaty of July 23, 1851, as to all annuities unpaid which accrued under that treaty, and in failing to hold that there is chargeable to appellant Indians under the provisions of the said act only such payments as have been made under and by virtue of

the terms of said treaty and such payments and other provisions as have been made by virtue of Congressional enactment restoring the annuities in part and specifically appropriating the same.

II.

In holding that gratuities, damages, supports, and payments for consideration set out in treaties or statutes appropriated by Congress and paid to appellant Indians, or to or for any members thereof, which payments were not made in accordance with the terms of the treaty of 1851, and not by authority of any existing act of Congress restoring the annuities of appellant Indians to the extent of such appropriations, are properly chargeable against the unpaid forfeited annuities under the terms of the jurisdictional act of June 21, 1906.

III.

In construing the jurisdictional act so as to direct the court in examining the acts making appropriations to claimants, which, by their terms, are not traceable to annuities, to determine "from the nature of the same and the circumstances under which they were made" whether they are properly chargeable against the unpaid annuities.

IV.

In construing the jurisdictional act approved June 21, 1906, so as to charge against the annuities of appellant Indians the amounts set out in items 2, 3, 4 and 7, and in part the amounts set out in items 5 and 6 of Finding VIII, and in failing to award to the appellant Indians a judgment for balance of annuities in the sum of $2,253,043.20.

ARGUMENT.

Congress has always Differentiated Indian Annuities from Gratuities and other Payments.

The construction of the jurisdictional act of June 21, 1906, is the basic issue raised by this appeal. In connection therewith this court is asked to construe treaties and statutes under which payments have been made to appellant Indians, to determine what of the same are properly chargeable to their unpaid annuities.

At the time said act was considered and passed, Congress had long been familiar with annuities granted to Indians, and in all acts making appropriations for the current and contingent expenses for the Indian Department and for fulfilling treaty stipulations with various Indian tribes, annuities had been treated separately from all other appropriations. Indeed, such was the case from necessity, because annuities invariably rested upon contracts between the United States and annuitants, which was not always the case as to other appropriations, such as gratuities, current expenses of the Indian Department, and various sums for support, so that when in this jurisdictional act Congress specifically authorized only such charges against the appellant Indians, as were properly chargeable against their unpaid annuities, the source against which the charge should be made was so clearly defined in the mind of the legislator as to leave no room for ambiguity.

A "charge" implies a "credit;" the common use of the word "chargeable" implies that the charge and credit should be set off, the one against the other, their derivation being identical. Hence, in this case the credit fund,

the restored annuities, should be charged only with such items of set off as are traceable to the original annuity fund.

The attention of the court is directed by the jurisdictional act to the credit established by the restoration to the appellant Indians of their annnities, against which, in the ascertainment thereof, charges only on account thereof are directed to be made, unpaid annuities being the subject matter of the jurisdictional act. This construction is essential to give force to the ordinary use of words in statutes.

The attention of the court is particularly directed to the various Indian appropriation acts passed by Congress from year to year, wherein it will be found that annuities are separately considered from other subjects of appropriation, and in such acts where gratuities or other appropriations are made, that the same are not made as a part of the annuities.

For convenience reference may be had to the act of Congress approved March 3, 1901 (26 Stats., 1035), an act which will be hereinafter referred to, making appropriations for the current and contingent expenses of the Indian Department, etc., and the attention of the court is called to the form of appropriation, which is the common form, as found on page 991, being the first item under the caption:

> "Fulfilling Treaty Stipulations with and in Support of Indian Tribes."
>
> "For twenty-fourth of thirty instalments as provided to be expended under the Tenth Article of the treaty of September twenty-first, eighteen hundred and sixty-seven."

That item is immediately followed by a distinct item for the purchase of clothing, another for the pay of farmer,

carpenter, blacksmith, etc., and another for the pay of physicians, teachers, etc., for the same tribe.

The same is true of the next item on page 992, in said bill, to the Cheyennes and Arapahoes:

> "For the twenty-fourth of thirty instalments as provided to be expended under the Tenth Article of the treaty of," etc.

This is also followed by an item for the purchase of clothing, an item for the pay of physicians, teachers, etc., and an item for pay of farmer, carpenter, etc.; the appropriations for the annual instalments, or annuities, being in each case, as thus illustrated, separate and distinct from appropriations for gratuities and various supports, the appropriations for annuities being the amounts stipulated to be paid for that distinct and separate purpose.

This is true, as will be found, of every appropriation bill, so far as counsel are advised.

In numerous cases, appropriations for gratuities, not specified in any treaty, have been made, distinct from and in addition to the annuities provided for in treaties, as is shown in the Indian appropriation bill approved May 27, 1902 (32 Stats. 245) wherein, in addition to appropriating the various annuities and other supports provided by the terms of treaty stipulations, there is also appropriated and authorized to be used for the benefit of any or all Indians (page 248) as follows:

> "To enable the Secretary of the Interior to employ practical farmers and practical stockmen, in addition to the agency farmers now employed, at wages not exceeding seventy-five dollars each per month, to superintend and direct farming and stock raising among such Indians as are making an effort for self-support."

"To enable the Secretary of the Interior to employ suitable persons as matrons to teach Indian girls in housekeeping and other household duties, at a rate not to exceed sixty dollars each per month, and for furnishing necessary equipments."

These illustrative appropriations for gratuities and supports, and like purposes, will also be found substantially in nearly every Indian appropriation act.

The appropriations made to cover annuities and other supports provided for by treaty stipulations are set out in each appropriation act under a distinct and separate caption, and the same is true of gratuities and other supports, as under the captions:

"Concurrent and contingent expenses (32 Stats. 245)."

"Fulfilling Treaty stipulations under and support of Indian Treaty (32 Stats. 248)."

"Miscellaneous Supports and Gratuities (32 Stats. 255)."

"General Incidental Expenses of the Indian Service (32 Stats. 257)."

"Miscellaneous (32 Stats. 258)."

"Support of Schools (32 Stats. 269)."†

This act last cited was passed by Congress when the present jurisdictional act was pending.

But not only did Congress thus differentiate between annuities and gratuities and other appropriations in the appropriation acts, but this policy is further shown by a reference to the Revised Statutes in dealing with the subject of annuities as distinguished from other payments to Indians.

By Sec. 2081 the Secretary of the Interior is directed to pay in coin any *annuity* payable in coin by the terms of the treaty.

Sec. 2082 provides that the President may, at the request of any Indian tribes, to which an *annuity* is payable in money, cause the same to be paid in goods.

Sec. 2089 refers to the disbursements of moneys whether for *annuities* or otherwise, thus differentiating annuities as a subject of legislation.

Sec. 2087 provides that "no annuities," or "moneys," or "goods" shall be paid or distributed to Indians while they are under the influence of intoxicating liquors.

Congress has gone further in differentiating respecting annuities and protecting the same from application to any other payments, as in Sec. 2097 of the Revised Statutes:

> "No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purposes, unless expressly provided by law."

And Congress has yet further differentiated the annuities and protected the disbursements thereof, as is provided in Sec. 2098 of the Revised Statutes:

> "No part of the money which may be appropriated in a general act or deficiency bill making appropriations for the current and contingent expenses incurred in Indian affairs, to pay annuities due to or to be used and expended for the care and benefit of any tribe or tribes of Indians, shall be applied to the payment of any claim for depredations that *may have been* or may be committed by such tribe or tribes, or any member or members thereof."

Thus it will be seen that Congress at the time of the passage of the jurisdictional act was well informed as to the signification of the word "Annuities" as set out in the jurisdictional act, as opposed to gratuities and other payments.

Congress has made the same Differentiation in Payment to Appellant Indians.

So, in this particular case, now here on appeal, Congress, in considering the jurisdictional act, necessarily had in mind, not only the general differentiation between the various payments to Indians, but, also, had under consideration the different kinds or classes of payments made to appellant Indians, some of which were traceable to annuities and others not so traceable, as follows:

First, as to Annuities.

By the act of March 3, 1885 (23 Stats., 344), the annuities were in part restored and by the same act appropriated to be paid to appellant bands and other bands of Indians; thus by the act named Congress specifically dealt with the forfeited annuities, restoring the same in part and applying the same to specific purposes.

By the 26th Section of the act approved March 3, 1891 (26 Stats., 1035), ratifying an agreement with appellant Indians dated December 12, 1889, Congress restored the forfeited annuities, in part, from the date of forfeiture to the end of the term (50 years), that is, up to July 1, 1902.

Under the 27th section the annuities, thus in part restored, being those accrued up to date, were appropriated, to be paid *per capita* to appellant Indians. Subsequent acts appropriating to pay the remainder of such annuity instalments to the appellant Indians were passed in accordance with the 26th section of the act of March 3, 1891, as follows:

Act approved March 3d, 1893 (27 Stats., 624);
" " August 15th, 1894 (28 Stats., 300);
" " March 2d, 1895 (28 Stats., 889);
" " June 10th, 1896 (29 Stats., 335);
" " June 7th, 1897 (30 Stats., 75);
" " July 1st, 1898 (30 Stats., 583);
" " March 1st, 1899 (30 Stats., 935);
" " May 31st, 1900 (31 Stats., 232).

By the same section of the act of March 3, 1891, Congress further provided that the forfeited annuities of certain of the appellant Indians and other bands, who also served in the armies of the United States against their own people, or in the War of the Rebellion, but who were not included in the said agreement of 1889, should be restored from the date of the forfeiture to the end of the term (50 years), that is, up to July 1, 1902.

By the same section of said act of March 3, 1891, Congress provided an appropriation of the annuities then accrued due to such scouts or soldiers.

By subsequent acts the remaining instalments of the annuities thus restored, being the proportionate share of said soldiers, as in the former case, were appropriated and paid to them, *per capita*, as follows:

Act approved March 3, 1893 (27 Stats., 624);
" " March 2, 1895 (28 Stats., 889).

Second, as to Gratuities and other Payments.

In contradistinction to these appropriations by Congress, wherein the annuities were restored and applied by Congressional enactment, Congress, after the forfeiture of the annuities, from time to time appropriated various sums of money for payments not traceable to annuities, as follows: For damages, for payments under the Treaty of 1867, and for various supports.

Payment for Damages not Properly Chargeable under Jurisdictional Act.

First, not by Forfeiture Act.

By the second section of the act of February 16, 1863 (12 Stats., 652), the act of forfeiture, there were appropriated certain sums to be paid to Commissioners, to be apportioned by them among persons who suffered damage by depredations of appellant Indians and United States

troops,. That act, though it was the very act of forfeiture, by its terms diverted a part of the annuities which it forfeited to purposes not provided for by the treaty of 1851.

It should be borne in mind by the court that the part of the annuities thus diverted is a part of the forfeited annuities, which Congress has restored in full by the terms of the jurisdictional act approved June 21, 1906, and the attention of the court is further called to the fact that the section above referred to, which diverted these annuities, is a part of the forfeiture act which the court by the terms of the jurisdictional act is directed not to consider in determining the amount due appellants.

By the act approved May 28, 1864 (13 Stats., 92), being an act making appropriations for payment of awards made by the Commissioners appointed by virtue of the act of February 16, 1863, the act of forfeiture, Congress appropriated certain sums of money for the payment of the several amounts awarded by said Commissioners, and the same were disbursed accordingly to persons who had suffered damages from appellant Indians and other bands, and by United States troops.

By act of March 3, 1877 (19 Stats., 549) Congress appropriated a sum of money to be paid to Hans C. Peterson, a claim not included in the report of the Commissioners, for damages sustained by him.

Attention is called to the fact that the wording of the act of Congress making this appropriation, being the last of the appropriations to pay damages, shows that Congress did not have in mind anything relating to the annuities of appellant Indians.

This is further disclosed by the fact that the several appropriations to be paid from the Treasury of the United States to pay damages, included damages committed by United States troops.

One-half of the amounts thus appropriated constitutes

in part Item 6, set out in Finding VIII of the Court of Claims (Record, page 12), and referred to by the court in its opinion, under Items 3 and 4 (Record, pages 17, 18, 20). Thus the court below has allowed to be diverted from the unpaid annuities and charged to appellant Indians as against unpaid annuities these payments for such damages awarded by the Commissioners.

The attention of the court is asked to the terms of the jurisdictional act, which specifically provides that the annuities shall be settled *as if said act of forfeiture had not been passed*, and therefore any provision carried in the act of forfeiture tending to charge the unpaid annuities of appellant Indians with any sum can have no force nor effect.

The jurisdictional act is more than a repeal of the forfeiture act; it is an *act of avoidance*. When a statute is simply repealed its consequences are not avoided; they are in the past. But it is manifest that this act directing the courts to determine the sums due the appellant bands of Indians, as if the act of forfeiture had not been passed, *avoids everything done under it, affecting annuities*. That is, nothing done under that act can be considered by the court in determining the amount due appellant Indians in this cause.

Second, not by Treaty of 1858.

The court below has referred to the treaty of 1858 (12 Stats., 1039), which provides in the 6th Article thereof, that compensation for any injury or depredation shall be made out of the moneys of appellant Indians in the hands of the United States, the amount in all cases to be determined by the Secretary of the Interior, and it is upon this ground that the court below has charged appellant Indians with such damages.

The preamble of the act of forfeiture of February 16,

1863 (12 Stats., 652), also recites that it is just and equitable that the persons whose property has been destroyed or damaged by appellant Indians, or damaged or destroyed by the troops of the United States in war with the said Indians, should be indemnified, in whole or in part, out of the indebtedness and annuities forfeited by said act.

The preamble of this act further recites, however,that savage war during the past year had been waged upon the United States by appellant Indians. The Court of Claims has also so adjudicated:

Van Loon *v.* United States, No. 1115, Indian Dep.
Darling *v.* United States, No. 9341, Indian Dep. reduction.

The error of the Court of Claims lies in having overlooked the fact that the treaty of 1858 was abrogated and annulled by the first section of the act of February 16, 1863, as far as it imposed any future obligation on the United States, and the further fact that a state of war existed which abrogated the treaty on the part of those engaged in that war, viz., Appellant Indians; so that, by the specific act of Congress and by the act of war on the part of the Indians, the treaty of 1858 ceased to exist, and no subsequent act of Congress, or subsequent treaty or agreement, has ever rehabilitated that treaty or called it again into existence.

There was, therefore, no authority in law to charge against the annuities of appellant Indians any part of these damages.

The Court of Claims has decided in a number of cases that war abrogates existing treaties with Indians.

(See Valk, survivor, etc., *v.* The United States and Rogue River Indians, 29 Court of Claims, 62.)

In speaking of the Rogue River Indians in that case, the Court of Claims said:

> "Tribes, bands or nations, who raid on their neighbors, wage war upon them, or commit depredations, cannot be held in amity in a country whose citizens they thus injure."

The same court, in an opinion in the case of William H. Hooper, administrator, *v.* The United States, and other cases involving the question of the abrogation of a treaty under the French Spoliation Claims act, has held generally that treaties may be abrogated by violation of one of the parties thereto.

Hooper, administrator, *v.* United States, 22d Court of Claims, 408.

It has been held that one contracting party may abrogate a treaty.

Henry W. O. Edye *et al.*, *v.* William H. Robinson, Collector, etc., 112 U. S., 580.

> "A provision in a treaty providing in express terms for the payment of depredation claims, can not be construed to cover claims arising by acts of war in the absence of express provisions of law or treaty." (Leighton *v.* U. S., 29 Ct. Cls. 288, 305.)

Where there is an uprising of Indians, whether against settlers or the government, and United States troops are used to suppress it, it is war, and neither the Indians nor the United States are liable for damages resulting therefrom. Leighton *v.* U. S. 161, U. S. 291; Marks *v.* U. S. 161, U. S. 291; Montoya *v.* U. S. 180, U. S., 261; Connors *v.* U. S. 180, U. S. 271.

In the case at bar it would be unconscionable to hold that the treaty of 1858 is abrogated so far as benefits enuring to the Indians is concerned, and still in force in so far as benefits enuring to the Government is concerned, the appellant Indians being powerless, the wards of the

Government, the United States acting as guardian for them, and the act before the Court for construction being remedial in character.

But, even if it be held that the treaty was not abrogated as to appellant Indians, no assessment of damages has ever been made in accordance with its provisions, that is to say, by the Secretary of the Interior.

Various Supports Not Chargeable.

Following still further the line of appropriations by Congress which have been charged by the Court below to the forfeited annuities now restored, it is found that by act of June 25, 1864 (13 Stats., 180) a sum was appropriated for appellant Indians and other bands of Sioux Indians, for subsistence, for clothing, and for general incidental expenses.

By act of March 3, 1865 (13 Stats., 559), a like appropriation was made covering the same subject-matter, viz: Subsistence, clothing, and incidental expenses, and again a similar appropriation was made by act of July 26, 1866 (14 Stats., 279), and again by act approved March 2, 1867 (14 Stats., 514), and again under act approved June 22, 1874 (18 Stats., 141).

These several acts by their terms appropriated sums for the support of the Sisseton and Wahpeton bands, known as "The Upper Bands" (appellant Indians), and for the Medwakanton and Wahpakoota bands, known as "The Lower Bands" (Santee-Sioux Indians), one-half of which has been charged against the unpaid annuities of appellant Indians by the court below in Item 6, Finding VIII (Record, page 12).

Respecting the several sums for various purposes included under Item 6 (Record, page 18)the court, in its opinion, has said:

"ITEM 6. $807,824.71.

"This is one-half of the amount of the several sums which have been appropriated by Congress at different times for the payment of damages to the settlers growing out of the outbreak of 1862, and other sums appropriated for the support of the four bands of Indians before mentioned. Some of these appropriations are in terms made chargeable to the annuities of the claimants (see 23 Stat. L., 344), while in other instances no mention of annuities is made."

The court below has been misled into making this statement, in that the act of March 3, 1885 (23 Stat. L., 344), set out in Senate Document 68, page 20, cited by the court in Item 6, Finding VIII, incorrectly designates the appropriation made in said act as for "damages," when in fact the said act directed the payment of the *debts* of appellant Indians and Lower Bands or Santee-Sioux, and by its terms specifically restored the forfeited annuities to the extent thereof and appropriated the same. The court below has confused this specific restoration and appropriation of annuities with appropriations for damages and for supports by saying that some of the appropriations for damages and supports were in terms made chargeable to the annuities of claimants, citing this act only, when in fact this appropriation has no connection whatever with either damages or supports, but does relate to restored and re-appropriated annuities, as shown *supra* in this brief in the last paragraph under the sub-heading, "First, as to Annuities," where it appears that this is one of the three acts of appropriation restoring annuities in part and appropriating the same, and admitted to be a proper charge against the unpaid annuities of appellant Indians.

The other acts appropriating sums for damages and support, going to make up the remainder of Item 6 of

Finding VIII, embrace no reference to annuities, as is contended, and the sums appropriated therein fall within that class of gratuities and other payments not chargeable under the jurisdictional act to the unpaid annuities of appellant Indians.

The various acts making appropriations for supports cited *supra* all contain the following language:

> "For subsistence and clothing and general incidental expenses of the Sisseton, Wahpeton, Medwakanton and Wahpakoota bands of Sioux or Dakota Indians at their new homes."

While these acts of appropriation included appellant bands along with the Lower Indians as beneficiaries, yet each act directs that the money shall be expended for the support of these Indians "at their new homes."

The history of the times shows that these appropriations were spent for the support of such of these Indians as were moved to new homes at Crow Creek, and later to Niobrara, which embraced only the "Lower Bands" or the Santee-Sioux.

The report of the Commissioner of Indian Affairs of April 20, 1866 (page 223) embraces these words:

> "It will be borne in mind that the Government has appropriated annually for three years one hundred thousand dollars for the support of the Sioux at Crow Creek alone."

The report of the Commissioner of Indian Affairs for 1866 (pages 44-45) embraces the following:

> "Santee-Sioux. Every important action having been taken by this office since the last annual report relative to the several bands of Santee-Sioux and their location having been changed to the Territory of Nebraska, I have deemed it expedient, etc. . . .

Nearly or quite one thousand were at the Crow Creek Reservation near Fort Randall, far up the Missouri River. These were mostly old men, women and children, the families of those who had been hung in Minnesota for participation in the massacre of 1862, or those who were imprisoned at Davenport for alleged complicity in the same outbreak. These Indians had thus far failed in their willing labors to raise crops at Crow Creek, and the expense of their care, subsistence and clothing, including transportation, had annually, nearly or quite, exhausted the appropriation of $100,000 made by Congress for their benefit, with no prospect of any improvement in the future.

It was evident from the successive annual reports from that quarter, and particularly from the reports of the northwestern treaty commissioners who visited the reservation, that the Indians must be removed from that place to one where they could earn their own subsistence."

On page 228 of the same report to Congress there is an estimate for the appropriation for the following purposes:

"For removal of Indians from Crow Creek to Niobrara.

"For subsistence for sixty days at Niobrara.

"For subsistence for twelve months on reservation."

It is an historical fact that appellant bands were never removed to Crow Creek nor to Niobrara, nor elsewhere, but that they are to-day living on their own lands in the two Dakotas, on two small reservations which are described in articles 3 and 4 of the treaty of 1867, and which are a part of the original lands to which they had the usual Indian title, described in article 2 of the treaty of 1867, and these reservations embrace what remained

of their large tract of country after the cession of the treaty of 1851.

(See official map bound in Senate Document, 55th Congress, 2d Session, Vol. 4, filed in the Library of Congress.)

Thus it will be seen that no part of the appropriations for support can be charged to appellant Indians; (1) because none of the same was ever paid to them or expended for their benefit; (2) because as shown by all the Congressional enactments, cited *supra*, it has never been the policy of the Government to charge supports and subsistence against the annuities of Indians; (3) and because, even if a part of these various sums for support had been expended for them, such sums are not traceable to unpaid annuities, for they are not authorized to be charged against the annuities under the treaty of 1851, nor did any act of Congress appropriating these amounts specifically restore the annuities and appropriate the same.

Payments under Treaty of 1867 were for Valuable Considerations Separate from Annuities and are not traceable thereto.

In addition to the damages, payment for which has been appropriated by Congress and is now sought to be charged against the annuities of the appellant Indians, and in addition to the gratuities hereinbefore referred to, there has been appropriated for appellant Indians certain sums of money arising under the treaty of 1867 (15 Stats., 506), under the following circumstances:

The preamble of that treaty discloses that it was made between the United States and a part only of the appellant Indians; that is, those who not only preserved their obliga-

tions to the United States, during and since the outbreak of 1862, but who freely periled their lives during that outbreak to rescue the residents on the Sioux Reservation, and to obtain possession of white women and children made captive by the hostile tribes, and being a portion of appellant Indians who did not participate in the massacre of 1862, and who, fearing the indiscriminate vengeance of the whites, fled to the northwest prairie.

Therefore, on the face of that treaty, the United States dealt only with Indians who had remained loyal during the outbreak, and, as the preamble further recites, asked that their adherence to their former obligations of friendship to the government and the people of the United States be recognized, and that provision be made to enable them to return to an agricultural life and be relieved from a dependence upon the chase for a precarious subsistence.

By the 1st article of that treaty this part of appellant Indians, as a primary consideration for the benefits sought, agreed to bind themselves, individually and collectively, to use their influence to the extent of their ability to prevent other bands of Dacotahs or other adjacent tribes from making hostile demonstrations against the government and the people of the United States.

By the 2d article of said treaty, as a further consideration for the benefits sought, the contracting Indians ceded to the United States "the right to construct wagon-roads, railroads, mail stations, telegraph lines, and other public improvements, as the necessity of the government might require, over and across the lands claimed by said bands (including their reservation as hereinafter designated), over any route or routes that may be selected by authority of the Government."

At this time the United States was under statutory obligation to the Northern Pacific Company to grant rights of way and to extinguish the Indian title to all

lands falling under the operation of the act chartering the said company approved July 2, 1864 (13 Stats., 365, sec. 2). That act embraced the lands of appellant Indians.

By the 3d and 4th article of said Treaty, in consideration of the cession made by the 2d article thereof, and in consideration of the faithful and important services said to have been rendered by the friendly bands of the Sisseton and Wahpeton Sioux, and also in consideration of the confiscation of all of their annuities, reservations, and improvements, two certain reservations were set off to these Indians.

By the 6th article of that treaty "recognition" and "provision" was made for the contracting Indians, a part of appellant Indians, in consideration of their destitution, resulting from the confiscation of their annuities and improvements. Congress agreed that it would, "in its own discretion, from time to time, make such appropriations as may be deemed requisite to enable said Indians to return to an agricultural life under the system in operation on the Sioux Reservation in 1862, including, if thought advisable, the establishment and support of local and manual labor schools; the employment of agricultural, mechanical, and other teachers; opening and improvement of individual farms; and, generally, such objects as Congress in its wisdom shall deem necessary to promote the agricultural improvement and civilization of said bands."

In pursuance of this treaty certain sums of money were appropriated by Congress from time to time, which have been charged by the court below to the forfeited annuities under Item 7, Finding VIII (Record, page 12), and as set out in the opinion of the court under Item 8 (Record, page 20).

There was no restoration by Congress of annuities under this treaty nor under the acts passed in pursuance thereof, as was the case in the appropriations to scouts

and soldiers, and for debts cited *supra*. No payment or benefit moved to appellant Indians under the treaty which is traceable to their restored unpaid annuities. The two reservations, as is shown, *infra*., were carved out of the lands admitted to have been held by them under the usual Indian title of occupancy. The optional payments made to them under the 6th clause of the treaty are by its terms traceable to *destitution* in consequence of the forfeiture of their annuities, but not to the *unpaid annuities*, restored by the last jurisdictional act. The destitution of the appellant bands, by reason of the confiscation of their annuities, formed no part of the consideration for which Congress from time to time made appropriations for their benefit. The destitution of these people, whether arising from the confiscation of their annuities or otherwise, might well appeal to the Congress of the United States and arouse its sympathy, but it furnished to the United States no consideration. The real considerations moving from the contracting Indians to the United States were frontier protection, cession of valuable rights of way, important services antedating the treaty, for which they received such, and only such, appropriations as Congress in its "own discretion" might make from time to time.

The face of the treaty discloses the only grounds which induced Congress, later, "from time to time," to make optional appropriations for the benefit of these people. Plainly, had the United States, as a contracting party, designed to charge the optional payments provided for in the treaty to be granted in consideration of the cession and benefits conferred by the contracting Indians, against their unpaid annuities, good faith would have required that fact to have been plainly written into the treaty, and especially is this so in this case, wherein the *guardian* was dealing with a *ward*.

The attention of the court is called to the opinion of the court below, under Item 7 (Record, page 19), in which it is held:

> "By this treaty, as already stated, the claimants ceded to the United States a right of way for railroads, telegraph lines, etc., over their lands, in consideration of which the United States confirmed to them certain reservations."

It will be seen by reference to the terms of the Treaty that the court below has been misled with regard to the reservations set apart for said Indians in the 3d and 4th articles thereof. The wording of the 3d and 4th articles, wherein it is stated that such reservations were set apart in consideration of certain cessions from said Indians, is confusing. A careful examination of the treaty, and the subsequent action by Congress with reference thereto, shows that the United States did, in fact, grant nothing to the Indians in the said articles. (See Act Feb. 14, 1873, 17 Stats., 456, and Act June 22, 1874, 18 Stats., 187, discussed *infra*.)

The lands set apart by the 3d and 4th articles of said treaty (1867) are disclosed, by the history of the times, to have been within the boundary of the lands described in the 2d article thereof, over which the various rights of way were ceded.

Supportive of this is the report of M. N. Adams, S. H. Forbes, and J. Smith, Jr., Commissioners to investigate the title and interest of the Sisseton and Wahpeton bands of Sioux Indians to the lands mentioned in Article 2 of the treaty with said bands of Indians (February 19, 1867), made to Hon. Columbus Delano, Secretary of the Interior, dated October 3, 1872, accompanying the report of the Commissioner of Indian Affairs (1872), at page 118.

Attention is also directed to the official map of the cessions and reservations of the Upper and Lower Sioux Indians, prepared in 1897 by the Interior Department to accompany statement concerning said Indians, bound in Senate Document, 55th Congress, 2d session, Vol. 4, and filed in the Library of Congress, referred to *supra*.

So, in considering the treaty in connection with the construction of the jurisdictional act approved June 21, 1906, it must be borne in mind that the land embraced in both the small reservations set apart in the 3d and 4th articles of the treaty were then claimed by the contracting Indians, and under authority of an act of Congress approved June 7, 1872 (17 Stats., 281), the Secretary of the Interior was directed to inquire into the title of the appellant Indians to this land, and report the same to Congress. This is the identical land described in Article II of the treaty of 1867, which includes the small reservations described in Articles 3 and 4 thereof. This was done, and Congress, being satisfied with the title by that report, confirmed an agreement with the contracting Indians to pay to them a certain sum of money for the indicated land. In that act, approved February 14, 1873 (17 Stats., 456), there was confirmed in part an agreement made with the appellant Indians for the relinquishment of their claims or interest in the described lands, less said reservations, and there was then appropriated the first of the ten instalments in payment thereof. By act approved June 22, 1874 (18 Stats., 167), the said agreement was fully confirmed, and the second instalment was appropriated, and thereafter, from year to year, during a period of ten years from the date of the relinquishment of said land by the appellant Indians, they were paid one-tenth of the agreed sum, until the admitted indebtedness of the United States for said land was paid in full, not as annuities or in lieu thereof,

but as a debt due the appellant Indians from the United States; thus settling, beyond possible controversy, that Congress intended any benefit moving to the contracting Indians under the treaty of 1867 to be compensated for otherwise than by the various tional payments from time to time paid to them, for the valuable concessions granted to the United States therein.

It should also be borne in mind that in 1872 the United States was still under statutory obligations to the Northern Pacific Railroad Company to make land grants to said company of alternate sections within the right of way secured from appellant Indians in 1867 and granted to the said railroad company (see act approved July 2d, 1864, 13 Stats. L., 365, sec. 3). The treaty of 1872 and the legislation executing the same enabled the United States to fulfill that obligation.

The court, being thus misled went further astray when it drew the conclusion in its opinion under the same item, in discussing article 6, as follows:

> "It should be remarked that Article VI above was added by the Senate as an amendment to the treaty as completed by the Commissioner, and that the original treaty made no reference to the matters therein mentioned as to the consideration, etc."
>
> "The above amendment is a clear indication to our minds that the Senate thereby intended that the sum so agreed to be paid should be in lieu of the annuities confiscated by the treaty of 1851. This opinion is strengthened with the fact that by a subsequent treaty (June 7th, 1872) the United States paid claimants $800,000.00 for the cession of the lands over which a right of way was given.
>
> "For the reasons given we have considered this item of $464,953,40 a proper charge against the claimants within the jurisdictional act."

As shown above, the only considerations moving from

the United States to the Indians for the valuable cession made by appellant Indians were the optional payments here charged by the court. The sum paid to appellant Indians under the treaty of 1872, cited by the court, was paid to them in consideration of the cession of their large reservation, less the two small reservations set apart therein, this being the reservation over which the rights of way had been ceded by the treaty of 1867, and in consideration for which only the said optional payments were made by the United States.

The Senate amendment, while it was adopted by the Indians and became part of the treaty, cannot be construed in the light of what may have been in the mind of the Senate alone. It is essential to consider what was in the mind of both contracting parties, and there is no warrant for the view that what was within the intent of the Senate only, representing one of the contracting parties to the treaty, was an "indication" as to what was intended by both of the contracting parties in the premises.

The court below says that this amendment "was added by the Senate as an amendment to the treaty as completed by the Commissioner, and that the original treaty made no reference to the matters therein contained as to the consideration, etc." An examination of the original treaty, to which the court refers, will show that Article VI inserted by the Senate as an amendment was not a new proposition injected into the treaty, but was adopted as a substitute for Articles VI and VII of the original treaty.

The original Article VI limited the benefits set out therein to the "Indians entitled to locate farms on the Lake Traverse reservation" defined in Article III, as opposed to those on the "Devil's Lake" reservation defined in Article IV of the treaty as finally proclaimed; to the Lake Traverse Indians there were provided the

following sums of money: For the year 1867, three hundred and fifty thousand dollars; for the year 1868, two hundred and fifty thousand dollars; for the year 1869, one hundred thousand dollars; for the year 1870, fifty thousand dollars; and thirty thousand dollars annually thereafter. Capitalizing the annuity thus proposed for these particular Indians by that article at five per cent we have the sum of six hundred thousand dollars therefor. Thus it will be seen that the aggregate money proposed to be expended for their benefit under the original Article VI amounted to one million three hundred and fifty thousand dollars.

Article VII of the original treaty, which was also stricken out by the Senate, provides that whenever there shall be five hundred persons located permanently upon Devil's Lake reservation an agent shall be appointed, and that there shall be expended for those Indians in their agricultural improvements and civilization the following sums: For the first year, one hundred thousand dollars; for the second year, two hundred thousand dollars; for the third year, one hundred thousand dollars; for the fourth year, fifty thousand dollars; and thirty thousand dollars annually thereafter. Thus, capitalizing the annuity at five per cent. or six hundred thousand dollars, there was proposed for the Devil's Lake Indians the sum of one million and fifty thousand dollars, and hence for all the Sisseton and Wahpetons, who were parties to the said treaty, the total sum of two million four hundred thousand dollars.

The money provisions in these Articles VI and VII in the original treaty were eliminated and in lieu thereof in substituted Article VI as proclaimed, optional payments were provided.

The plain deduction is that Congress was not willing to grant the definite sums of money originally agreed upon, but in lieu thereof named the said "optional payments."

The court below has said that the original treaty "made no reference to the matters therein mentioned as to the 'considerations,'" but the treaty itself discloses the considerations as fully set forth herein *supra*. But, when the eliminated Articles VI and VII of the original treaty are examined in connection with the Article VI as substituted by the Senate, to determine if the sums named in the original articles, and the "optional payments" named in the substituted article as proclaimed, was intended to be in lieu of the unpaid confiscated annuities of appellant Indians, it is most significant that no mention of the confiscated annuities appears in either article, or in the treaty; as has already been noted *supra*, had such intention existed on the part of the United States, good faith would have required it to be set out. A concealed intent on the part of the United States did not bind the Indians. The rule of construction of Indian treaties has frequently been announced by this court.

In Worcester *v.* Georgia (6 Pet., 582) it was said by Mr. Justin McLean in his concurring opinion:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

This beneficent rule of construction, the Indians being "an unlettered people," has been applied by the court in a number of cases, as in United States *v.* Kagma (118 U. S., p. 385) as follows:

> "These Indian Tribes are the wards of the Nation.

> They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen."

The attention of the court is also called to the fact that the optional payments, which Congress promised in its "own discretion" to appellant Indians, was not only an indefinite, but, as resulted, a very insignificant compensation for the very valuable considerations, including not only the rights of way for railroads, etc., but, also, the past friendly services and the guarantee of continual future friendly services, moving from appellant Indians to the United States, as set out in said treaty.

For the reasons given above, it is contended that such payments cannot be properly set off against the unpaid annuities. But, if there should be any doubt from the terms of that treaty on this point, then clearly all doubt is removed by the subsequent action of Congress with the friendly portion of appellant Indians, wherein Congress on two occasions restored that portion of appellants' unpaid annuities as represented the friendly Indians, and appropriated the same for their benefit, as set forth *supra*.

If the payments made to appellant Indians under the treaty of 1867 had been considered by Congress as a partial restoration and appropriation of the annuities of the friendly portion of appellant bands, then surely Congress

would not have, later, by the agreement of 1889, and the appropriation act of 1891, again specifically restored and reappropriated the same money.

Thus it becomes clear that the court below was misled into construing the treaty of 1867, in connection with the jurisdictional act, so as to make the optional payments made under said treaty traceable to annuities.

When the court says, "in lieu of the annuities confiscated by the treaty of 1851," the intention clearly was to refer to the forfeiture act of 1863.

Payments to or for Appellant Indians held by the Court not Properly Chargeable against Unpaid Annuities.

There were two additional items appropriated under the act approved May 3, 1863 (12 Stats., 784), and the act of June 25, 1864 (13 Stats., 172), which items, by the terms of the acts, were to be expended for the removal of appellant and other bands of Indians. The Court of Claims, in its opinion under Item 6 (Record, page 18), holds that these sums are not properly chargeable against appellant Indians.

By the terms of an act approved May 16, 1874 (18 Stats., 47), another sum was appropriated to be expended to pay certain claims against appellant bands and other bands. The court below finds, under Item 8, that this sum is not properly chargeable under the jurisdictional act. The court says:

> "This appears to us to be a transaction entirely independent of the account under consideration, and in no way connected with the annuities provided for by the treaty of 1851, and hence not a proper charge against the claimants in this case" (see Record, page 20).

This rule which the court below has formulated to apply to that item, if amended in accordance with the terms of the jurisdictional act approved June 21st, 1906, so as to insert the words "unpaid annuities of" before the word "claimants," would be substantially the rule which appellant bands now ask the court to formulate and apply to each item in this case.

The Rule Prayed by Appellant Indians.

It is submitted that under a proper construction of said jurisdictional act nothing should be charged against the forfeited unpaid annuities, now restored in full, except such payments as have been made in accordance with the terms of the treaty of 1851, or made by the terms of Congressional enactments now in force, which have specifically restored said annuities in part and appropriated the same to the extent thereof.

The application of this rule will exclude all payments as matters of set-off against unpaid annuities except such as have been made under the Treaty of 1851, or under congressional enactment restoring the annuities in part, and therefore will exclude all payments made for damages and all payments made under the treaty of 1867, as well as all gratuities and various supports, all of which the court below has held to be traceable to the unpaid annuities of appellant Indians.

Finding VIII a Conclusion of Law.

The court has said under Finding VIII (Record, page 11):

> "In accordance with the jurisdictional act hereinbefore set forth, the court states the following account," etc.

This finding, including the statement of account, is not properly a finding of fact but a conclusion of law.

The statement of account to determine the balance due appellant Indians involves not only the construction of the jurisdictional act, but also the construction of all treaties and acts of Congress bearing upon the subject of the annuities of appellant Indians in connection with the history of the times.

For these reasons this court is certainly not bound by Finding VIII, and the appellant bands have the right to question and this court the jurisdiction to review every item of the statement.

The object of the legislation contained in the jurisdictional act and the construction of the treaties and Acts of Congress relating to said unpaid annuities in connection with the history of the times, have been cited and discussed *supra* as applied to every item in the account except Item 5.

The charge comprising Item 5 of Finding VIII, is half of a certain appropriation, explained in that part of the opinion which discusses that item. (Record, page 18). The opinion recites that, as there is no "reliable evidence . . . showing with any degree of certainty, how much of this amount went to each band . . . the just way of settling the matter is to charge one-half . . . to the claimants," the appellant bands.

This statement by the Court of Claims raises a question respecting the construction of the jurisdictional act in the light of the history of the times.

It is shown by a report of the Commissioner of Indian Affairs, embodied in Senate Document 168, 57th Congress, Second Session, at page 4, transmitted to Congress by the Secretary of the Interior as follows:

"An investigation of the evidence submitted by

applicants for enrollment, goes to show that of the 138 names on the census of the scouts and soldiers made in 1891, 65 of them belonged to the Medawakanton and Wahpakootah bands, 13 to the Sisseton and Wahpeton bands, and 60 doubtful, not finding evidence upon which to identify them as to their bands."

While this extract from said report has been held by the Court of Claims not to be reliable evidence, it is a part of the history of the times and may be considered to determine whether a proper construction of the act warrants the charge of one-half of Item 5 against the unpaid annuities of appellant Indians, instead of one-sixth, the proportion indicated in the above cited report. There is no other guide to a proper charge.

For the reasons just given and for the reasons given with reference to all other items *supra*, it is submitted that under a proper construction of the jurisdictional act, laws and treaties as asked by appellant Indians, the statement showing the balance of unpaid annuities due said bands, less matters of set-off properly chargeable against the same, should be as follows:

Credits.

By fifty instalments of $73,000, treaty July 23, 1851	$3,680,000.00

Debits.

Item.		
1.	To twelve instalments or annuity appropriated under the treaty of 1851 (10 Stat. L., 949), prior to outbreak, less $104.66 and less $122,509.12	$760,586.22

2.	(Not to be charged.)		
3.	(Not to be charged.)		
4.	(Not to be charged.)		
5.	To one-*sixth* of amount paid to scouts and soldiers of the four bands, instead of one-*half* the amount thereof	34,392.21	
6.	To one-half of amount of annuities restored and appropriated to pay debts of appellant and other bands of Indians under act of March 3, 1885 (23 Stat. L., 344)	50,000.00	
7.	(Not to be charged.)		
8.	To amount paid under agreement of December 12, 1889	581,978.37	
			$1,426,956.80
	Leaving a balance due to appellant Indians of		$2,253,043.20

The Jurisdictional Act is Remedial.

Congressional Intent.

It was the intention of Congress, as expressed in the jurisdictional act approved June 21, 1906, to bury in the oblivion of time the "devilish acts" (Record, page 9) committed during a state of war. In so far as the Court of Claims failed to bear in mind this intent of Congress in its decision, as applied to the charges which it has allowed against the forfeited annuities of appellant Indians, it has failed to construe the jurisdictional act in accordance with the Congressional intent.

The history of the times and the history of the legisla-

tion leading up to the jurisdictional act discloses this intent of Congress.

Every act of Congress up to the last jurisdictional act, in restoring the annuities in part except the Act of 1885 to pay *debts*, was an effort to restore the proportionate amount of the forfeited annuities due to those found to have maintained their loyalty to the Government, or to have served in the armies of the United States.

This intent is also shown by the terms of the first jurisdictional act, wherein Congress directed the Court of Claims to ascertain the loyal members of said bands, as distinguished from the terms of the last jurisdictional act; when Congress came to consider the last jurisdictional act, as shown by the terms of the act itself, it determined to eliminate from consideration by the courts the question of loyalty, and distinctly provided that all of the annuities remaining unpaid should be restored, the amount found to be due to appellant bands arising from their annuities thus restored to be charged only with such matters of set-off as are properly chargeable against said *unpaid annuities*

Need for Judicial Investigation.

It has been held by the Court of Claims respecting the rule for which appellant Indians contend, namely, that there should be set off against the amount found to be due to them only such sums as have been paid in accordance with the provisions of the treaty of 1851, or which have, by act of Congress, been specifically charged against their restored unpaid annuities, that "If the claimants' contention is right there was no reason or necessity whatever for the transmission of the case to this court" (Record, page 7).

Counsel answering this statement of the Court of Claims, say that abundant reason for the reference arose from the contention of the United States as set out in the

account made up and submitted by the Secretary of the Interior, referred to in the opinion of the court (Record, page 7) in the paragraph preceding that from which the quotation just made has been extracted, as opposed to the claims of appellant Indians, both of which were before Congress when the last jurisdictional act was under consideration; but there was a further reason, namely, that Congress had made certain appropriations restoring the annuities and appropriating them, and the proper examination of those statutes and their application and determination as to how far they restored annuities, was a subject with which the courts could better deal than could Congress, and therefore a proper subject for judicial determination. So that the court below was mistaken in stating that under the construction of the last jurisdictional act as asked by appellant Indians, there would be left "A mere problem of addition and subtraction which any schoolboy could solve in a very few minutes" (Record, page 7).

Illustrating the extent to which the court was thus mistaken attention is called to the fact that one of the acts of Congress which specifically restored the annuities in part and appropriated the same to pay the claims of *licensed traders*, that is, the act approved March 3, 1885 (23 Stats. L., 344), cited *supra*, was confused by the court below with appropriation for damages and included in Item 6 of Finding VIII (Record, page 12), the object to which the appropriation was actually applied having wholly escaped the attention of the court in its opinion.

The fact that the Court of Claims, in the sifting incident to hearing and a judicial determination, became thus confused, illustrates the fact that Congress recognized enough difficulties to warrant a reference of the case to the court under the limitation imposed by the last jurisdictional act.

It will be seen that difficulties, similar to those which the court below failed to avoid, may have presented themselves to Congress, and that these difficulties would essentially become factors to induce reference of the case to the court for adjudication. Further, under the rule prayed as the proper construction of the jurisdictional act, an examination of all of the statutes and treaties cited in this brief and in the opinion of the court below, became necessary to state the account in accordance with that rule, in view of the attitude of the Government, seeking, both before Congress and the courts, to charge appellant Indians with the various sums set out in the record, part of which have been charged by the court below, from which appeal is now taken.

A Strained Construction.

To hold contrary to the contention of appellant Indians and the rule of construction urged here and in the Court below it has been necessary for the Court of Claims to construe the last jurisdictional act by separating the words "All payments or other provisions of every name and nature made to or for said bands" from the words "Properly chargeable against said unpaid annuities." The court has said, "First we are told to set off 'all payments or other provisions of every name and nature made to or for said bands,' and afterwards only such 'as are properly chargeable against said unpaid annuities'" (Record, page 8). It is urged that the latter of these clauses, namely, "which are properly chargeable against said unpaid annuities" are words of limitation and the words of the former clause are dependent upon them. It will be observed that the entire clause embraces the direction to the court, "To ascertain and set off against the amount found to be due to said Indians, if any, all payments or other provisions of every name and nature made to or for

said bands by the United States, or to or for any members thereof since the said act of forfeiture was passed, which are properly chargeable against said unpaid annuities."

Plainly, the things to be set off are grouped under the words, "all payments" and "other provisions of every name and nature," as limited by the words, "which are properly chargeable against said unpaid annuities," that is to say, only such "payments" and "other provisions" as are a proper charge, not against the Indians, but against their unpaid annuities. It is submitted that the words of the statute can bear no other construction, and, being plain, they construe themselves.

It is a strained construction to hold that the words authorize the "nature and circumstances" of appropriations not traceable to the restored "unpaid annuities" to be examined, in order to ascertain what are chargeable against "unpaid annuities," as has been held by the court below (Record, page 8). The act itself points out clearly and unequivocally the things that shall be set off against the unpaid annuities of appellant Indians by the words "*properly chargeable against said unpaid annuities*," the *things* thus to be charged being grouped in the connecting antecedent clause of the very sentence containing these limiting words.

The Jurisdictional Act not Ambiguous.

Nothing beyond the ordinary scope of the words embraced in the jurisdictional act was within the intent of Congress, and the court was limited to charges traceable to the unpaid annuities of appellant Indians in the examination of proper charges or matters of set-off against the same. In so far as the court below found payments proper subjects of charge or matters of set-off, which, "from the nature of the same and the circumstances under which they were made," including those "caused by their own devilish acts" of war, and in their examination departed

from payments traceable to the unpaid annuities of appellant Indians in raising charges and matters of set-off against the same, it failed to properly interpret the legislative intent.

The rule of construction, as it seems to counsel, has been stated by Chief Justice Taney, in delivering the opinion of the court in Aldridge *et al. v.* Williams (3 How., 24) in the following language:

> "The law, as it passed, is the will of the majority of both Houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

It has been shown, in the light of the history of the times and the policy of the Government in legislative enactments making payments to Indians, cited *supra*, how clearly annuities have been contradistinguished from gratuities, supports and other payments. It should be noted that the last jurisdictional act, though clear on its face, was passed with these things in mind; so that, if there be any difficulty incident to supposed ambiguity, then the legislative intent cannot be extended beyond what is shown on the face of the act, except in the light of this governmental policy.

The act of forfeiture was a penal act; the jurisdictional act (June 21, 1906) is one remedial in character, one creating benefits, and must be liberally construed.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1907.

No. 338.

The United States

vs.

The Sisseton and Wahpeton Bands of Sioux Indians.

No. 339.

The Sisseton and Wahpeton Bands of Sioux Indians

vs.

The United States.

REPLY BRIEF FOR CLAIMANTS.

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REPLY BRIEF FOR CLAIMANTS.

In our original brief, in the statement of the case and argument, we presented and discussed fully all of the the questions which we conceived to be raised before this court on appeal.

Counsel for the Government, however, has restated the case, and has gone into details, respecting items of account, substantially as if the case were on hearing in the court below. This has made it necessary for claimants (the appellants) to supplement their statement and enter somewhat into details in this their reply brief.

It is to be borne in mind that we are not stating a general account between the claimants and the United States. We are considering only the account affecting the unpaid annuities.

The claimants have now and have had for many years funds in the Treasury, subject to various expenditures. The amount of these funds varies from year to year as expenditures are increased or diminished, or as the membership of the tribe is augmented or decreased. With that account we have no concern, our duty being confined to the making of a statement which shall disclose the balance of claimants' annuities provided in the treaty of 1851, which remain unpaid by reason of the Forfeiture Act of 1863, after deducting proper charges under the jurisdictional act.

In the statement of the case on the part of the United States there are some errors to which the attention of the court is respectfully invited:

1. It is stated that claimants are proceeding under *two* special acts of Congress. Such is not the case. The first act referred to authorized the Court of Claims to make findings only, which were to be reported to Congress. The second act directed the Court of Claims to award judgment, and the court has proceeded under that act alone, as it was bound to do.

The first act is not at all essential to the jurisdiction of the courts. The suit brought under the first act resulted in the finding by the court that the act required that court to ascertain by name the individual members who remained loyal to the United States throughout the diffi-

culties which brought about the forfeiture of their annuities, and that it could not do so. A motion for a rehearing was made, and while that motion was pending, Congress, by the second act, conferred full jurisdiction on the courts to proceed in that case, directing that the account should be stated, and authorizing an award of judgment for whatever balance, if any, should be found due, after making deductions of the sums properly chargeable against the unpaid annuities.

2. It is stated that the claimants were removed from Minnesota. This we deny; and in our answer to the defendants' second assignment of error we shall show that there was no removal of the claimant Indians. The document referred to in the defendants' statement does not sustain the allegation that the claimants "were removed."

3. It is stated that the claimant bands had never made claim to the Dakota lands "in any previous treaty or agreement." With the qualification in the quoted words, the statement is correct but immaterial. The claimants had claimed these lands from time immemorial, and the Government subsequently recognized the justice of their claims, procured a cession of those lands and paid for them under the agreement of 1872 (*infra*).

4. Defendants have not intended to say that the sum of $581,978.37 was paid under the agreement of 1889, plus three additional instalments aggregating $55,200; but they do not make clear that the $55,200 is comprehended within the larger sum—a credit we admit.

5. The statement that the sum of $206,353.30 was all

paid to the scouts and soldiers of claimant bands is without foundation in fact, as shown in our discussion of the charge of one-half that sum by the Court of Claims (*infra*).

Construction of Act of June 21, 1906.

In their construction of the original act of reference (31 Stat. L., 1078), and of the jurisdictional act under which we are now proceeding (34 Stat. L., 372), the defendants say that their united effect was simply to repeal the Act of Forfeiture only in so far as it affected the balance of the annuities granted under the treaty of 1851, "after deducting the charges enumerated by the two acts of Congress."

The issues might be beclouded if from this language the court should believe that any charges were "*enumerated* by the two acts of Congress."

The first act referring the case to the Court of Claims was, as we have stated, one which authorized the court to make findings only; it was to report to Congress what annuities provided by the treaty of 1851 would be due the loyal members of the bands if the Forfeiture Act had not passed; and it was also to "*report to Congress* what lands, appropriations, payments, gratuities or other provisions" had been made to or for said bands, or the members thereof, since the passage of the Forfeiture Act.

There was no authority under the first act to charge anything. Congress wanted a report as to all payments and provisions so that it could determine those that were properly chargeable if any. The second act under

which we are now proceeding authorizes thecourt to render final judgment for balance of annuties found due under the treaty of 1851 as if the Act of Forfeiture had not been passed; "and to ascertain andset off against the amount found to be due to said Indians, if any, all payments or other provisions, of every name or nature, made to or for said bands by the United States, or to or for any members thereof, since said Act of Forfeiture was passed, *which are properly chargeable against said unpaid annuities.*"

Thus it is seen that Congress did not, by either act, "enumerate" any charges to be made against the annuities, but placed upon the court by the last act the duty of determining what sums, if any, are properly charge able against them; and with the amount of the balance of the unpaid annuities certainly fixed, we have only to determine the sums which may lawfully be charged against that amount.

"As if the Act of Forfeiture Had Not Been Passed."

The defendants say that the jurisdictional act merely repealed the Forfeiture Act, and did not attempt to invalidate or modify any of the acts done under or in pursuance of the Forfeiture Act. We cannot agree with this position. The Forfeiture Act is not merely repealed but its consequences are absolutely avoided.

We are to state the account of the balance due on annuities as if the act of forfeiture had never been passed.

Speaking broadly, for the purpose of our consideration of this case, the Act of Forfeiture never was passed.

To speak more literally, that act is avoided *ab initio*, and everything done under it or in consequence of it is now undone.

The Forfeiture Act authorizesthe diversion of a part of the annuity fund from the channels through which under the terms of the treaty creating it, it was to flow; and as we shall show, under another heading, that act limited the charge to be made against the annuities on any account to $100,000.

The defendants say also that the jurisdictional act does not express an intention upon the part of Congress to repeal any of the acts subsequent to the Forfeiture Act, and they say that such intention would be antagonistic to the language used in the original act of reference "making chargeable against the unpaid annuities lands, appropriations, etc."

[Again the mistake is made of advising the court that the origimal act of reference makes anything *chargeable* against the fund]. It is not necessary to find that subsequent acts appropriating moneys to citizens or others, on account of acts imputed to claimants, or for other purposes affecting them, are repealed by the jurisdictional act. Those acts have served their purpose and we have nothing to inquire regarding them except—

Are the sums appropriated by the subsequent acts proper charges against the annuity fund?

What Are Proper Charges?

There should be no difficulty in determining what are proper charges. Certainly no charge is proper that is made without the authority of law. The law affecting Indian tribes is contained in treaties or in statutes. Were appropriations made to pay for damages, for instance, or for supports, authorized by any treaty with the Indians, since the Forfeiture Act *as a charge against their unpaid annuities*? Or have such payments been authorized by any act of Congress since the Forfeiture Act *as charges against the unpaid annuities*? In either event the sums appropriated are proper charges. If they were not appropriated and paid under the authority of a treaty or a statute then they are manifestly improper. As we have just stated, no act of Congress has authorized a charge against the unpaid annuities except the Forfeiture Act (which we are not to consider), and the acts appropriating the several sums paid to the scouts and friendly Indians of claimant bands and that which appropriated $50,000 to pay debts, which sums we admit to be properly chargeable. Nor is there more than one treaty made subsequent to the treaty creating the annuity fund, which authorizes a charge for depredations, and as we shall show under its proper heading, no sum paid under that treaty is authorized to be charged against the fund in question.

The defendants say that all payments made to claimants were expressly charged against their unpaid annuities by the treaty of 1851, or the acts of Congress itself

subsequent thereto. This statement we have denied in advance, and will disprove when we come to consider the several debit items adopted by the Court of Claims, or urged by the defendants. The several acts show on their face what appropriations are chargeable against claimants' unpaid annuities.

The defendants repeat their error made in the court below, that the words "properly chargeable," as employed in the jurisdictional act, have application only to payments made to individual members of claimant bands. We do not care to dignify this suggestion by extended discussion, or to say more than that defendants' position is that if the money was paid to individuals the court must determine whether it was properly chargeable against the unpaid annuities, while if paid to the bands and distributed among their individual members, it makes no difference whether the fund is properly chargeable or not; that is to say, that an improper charge may be made.

The defendants say that at the time of the making of the treaty of 1851 the only lands to which the claimants had title were those in the State of Minnesota which were ceded by that treaty, and that their only assets were the annuities granted by the treaty; yet, as will presently appear, the claimants were the owners of a vast territory in Dakota adjacent to the lands which were ceded by the treaty of 1851; and it will further appear that by this treaty of 1851 the Indians were recognized as the owners of the reservation on which they were then

living, which was subsequently purchased from them and paid for by the United States.

It is stated by the defendants in opposition to our theory as to payments properly chargeable, that an examination of the various appropriation acts under which payments were made to claimants, or provisions for their benefit, shows that they were made for the purposes to which the annuities were to be applied, except the payment of the claims for damages, and that those sums were made chargeable against the unpaid annuities by the Forfeiture Act, or certainly by the treaty of 1858.

This statement we deny. It is true that some charges are made by the court below against the unpaid annuities for sums alleged to have been contributed to the claimants' support; but as we have shown in our original brief the sum charged was not the sum provided by the treaty of 1851, nor was the amount alleged to have been paid for support made chargeable against the unpaid annuities; and we shall show under the head of payment for damages that the only act which authorized any payment for damages was the Forfeiture Act, which we are not to consider, and that even that act limited the charge on that account to $100,000; and finally we shall show that the treaty of 1858 does not authorize payment for damages at all, and certainly does not provide for a charge against the unpaid annuities for damages resulting from war.

Reply to Defendants' Assignment of Error.

The first error assigned is an error. The Court of Claims twice credited the claimants with $104.66.

The second error assigned by the defendants is that the court should have charged the claimants with $81,530.03, being one-half the sum expended for removal. The claimants contended in the Court of Claims, and now insist, that no charge for removal may be made because the claimant bands were never removed. But the court below, without determining this fact, based its refusal to make this charge upon the following reasons:

1. It was not a charge for damages and could not be made under the authority of the treaty of 1858.

2. It was not authorized as a charge under the court's interpretation of the jurisdictional act.

3. It was the policy of the United States itself to pay the expenses of the removal of the Indians.

While the first of these reasons is not one offered or assented to by the claimants, they are entirely agreed with the second reason assigned. That it was the policy of the Government to remove the Indians when they could be so persuaded, and to pay the expenses of such removal, is an established historical fact. This was declared as a policy as early as the act of May 28, 1830 (4 Stat. L., pp. 411–412). This was an act "to provide for an exchange of lands with the Indians residing in any of the States or Territories and for their removal west of the River Mississippi," and, as the title indicates, was one having general application to all

Indians living east. By section 5 of this act, it was provided that upon the making of such exchange of lands, as the act contemplated, it should be lawful for the President to cause such aid and assistance to be furnished to the emigrants as might be necessary and proper to enable them to remove to and settle in the country for which they may have exchanged; and also to give them such aid and assistance as might be necessary for their support and subsistence for the first year after their removal.

By section 8 of this act the sum of $500,000 was appropriated for the purpose of paying for the removal and subsistence of such Indians.

Instances are numerous. The following treaties provide for the removal and subsistence of the Indians named, at the expense of the Government:

With the Cherokees (1828). 7 Stat. L. 310, Art. 8.

With the Choctaws (1830). 7 Stat. L. 333, Art. 16.

With the Creeks (1832). 7 Stat. L. 367, Art. XII.

With the Seminoles (1832). 7 Stat. L. 369, Art. 7.

With the Cherokees (1835). 7 Stat. L. 478, Art. 8.

(See Cherokee Nation *v.* United States, 202 U. S. 101).

That this policy was not confined to the Indians living east, or to the Five Civilized Tribes, is apparent from like provisions in the following:

With the New York Indians (1838). 7 Stat. L. 550, Art. 15.

With the Chippewas (1864). 13 Stat. L. 695, Art. 12.

Act of July 26, 1864. 14 Stat. L. 280, Sec. 3.

This last act appropriates a half million dollars for the removal and subsistence of the Indians of the southern superintendency.

It is to be borne in mind that the removal of Indians from one reservation to another was never accomplished except upon the insistence of the Government. The Indians once settled on a reservation, desired to remain there; and particularly is it true that Indians of all tribes were always reluctant to give up the homes of their fathers, to be removed to another climate and to unfamiliar surroundings. For that reason it has always been the policy of the Government to pay for the removal of Indians, their subsistence during removal and for a certain time following removal; and the promises of treaties, or the provisions of acts of Congress to this effect have been in some instances extended by continuing appropriations for subsistence beyond the term originally provided for in the treaty or in the act. We cannot point the court to a single instance of a treaty in which the Indians agreed that the expense of a future removal was to be paid out of their own funds.

While this last reason is a perfect warrant for the refusal to charge the expense of removal to the annuity fund, and is, therefore, a sufficient answer to defendants' contention, yet we desire the court to bear in mind our assertion that the claimant bands were never removed, as this is one of the grounds upon which we deny the proposed charge for support to be a correct one. (Original Brief, pp. 19–21.)

The defendants assign as a third error that the court did not charge claimant bands with $25,472.30 paid to creditors. The court's reason is that advanced by claimants—that this sum was to be paid and was paid out of the proceeds of the sale of certain of claimants' lands in pursuance of the treaty of 1858, and that such payment was "a transaction entirely independent of the account under consideration."

This appropriation was made May 16, 1874 (18 Stat. L., 47).

The act provided for the payment of debts in a sum not to exceed $70,000, in accordance with Article 3 of the treaty of June 19, 1858, which is in these words:

> "That if the Senate shall authorize the land designated in Article 2 of this agreement to be sold for the benefit of the said Sisseton and Wahpeton bands, or shall prescribe an amount to be paid to said bands for their interest in said treaty, provision shall be made by which the chiefs and headmen of said bands may, in their discretion, in open council, authorize to be paid 'out of the proceeds of said tract' such sums as may be found necessary and proper not exceeding $70,000 to satisfy their just debts and obligations" (12 Stat. L., pp. 1038, 1039).

We can offer no other or more conclusive answer.

The defendants assign as the fourth error the refusal of the court to charge the claimant bands with the whole sum, $206,353.30, paid under the several acts referred to in the assignment of error, to those friendly persons and scouts of both the claimant bands and the lower bands

who had not been beneficiaries under the agreement of 1889 (Item V of Findings).

The court charged claimant bands with one-half this sum, and their action in that respect is assigned as error also by the claimants, who have insisted that they are chargeable with but one-sixth the sum. (Original Brief, pp. 3, 4, 5.)

The absurdity of the claim that the entire amount should be charged to the claimant bands is apparent from these official evidences:

1. The acts in terms make the appropriations aggregating this sum payable to scouts of all four of the bands, two of which are claimants, the upper bands, and two comprising the lower bands.

2. The report of the Commissioner of Indian Affairs, cited in claimants' brief at page 34, and also by the defendants, shows that this sum was distributed among 138 persons, only 78 of whom were identified as being members of the upper or lower bands. Of these identified persons only 13 were found to belong to claimant bands, while 65 were found to belong to the lower Indians, leaving 60 persons unidentified as to their bands. On pages 34 and 35 of our original brief we have cited this report of the Commissioner of Indians Affairs. The defendants object that we omitted the last paragraph wherein it is stated that the Santee Sioux are chargeable with at least $94,610.44 of this amount (the Santees being the lower Indians), and that the amount to be charged against them is subject to increase, if any of the unidentified 60 be ascertained to be Santees. We note this correction cheerfully.

Our position respecting thi item will bear restating. This report of the Commissioner of Indian Affairs was made with referemce to a proposition to restore the annuities of the lower Indians. The same language was employed in reporting to the Senate Committee upon this very claim we are now considering. (Senate Rep. 2178, 59th Congress, 1st session, p. 8.)

The opinion of the court below recites that the evidence is not reliable, and that it does not show with any degree of certainty how much of this amount went to each band, and therefore that the just way of settling the matter is to charge one-half to the claimants. If one-sixth the known and identified Indians were members of claimant bands there is no reason why the same proportion of unidentified Indians should not be charged to claimants. While the court determines that there is no reliable evidence to show with certainty the amount which went to each band, it expresses the legal conclusion that the just way to settle the matter is to charge one-half to each. We urge that this is a conclusion reviewable by this honorable court, and that no court has the right to disregard the official statement just cited in the absence of evidence to contradict it.

In the taking and stating of the account we are compelled to rely upon the official statements of the Interior Department—not, indeed, as to the correctness of the charges, but as to the amounts actually paid or appropriated or distributed for a certain purpose. It would be impossible otherwise to state the account. If, then, we must accept the official statement of the Interior

Department for that purpose, why are we not permitted to consider the statement of the Commissioner of Indian Affairs, reciting that the evidence on file in the Department goes to show that one-sixth of the identified Indians (the number being given as 13) were members of the claimant bands? Why are we not permitted to consider the statement of the Government's account against the lower bands who are charged with about $95,000 of this sum as having been paid to their identified members alone? The Interior Department, in response to calls made upon it by the Court of Claims, stated that there was no evidence on file in the Department *at the time of the call* upon which this report could be based, but the evidence was there January, 1903, when the Commissioner wrote the report.

It does not make any difference whether the evidence is there now or not. It was there once; and the best testimony on that subject is that of the Commissioner of Indian Affairs who made the report, and who was charged to see that the fund was properly disbursed to Indians whom he could identify as belonging to one of the four bands for whose benefit the appropriations were made.

In view of these official reports, we insist, therefore, that the conclusion of law reached by the court to charge one-half to the appellant bands and one-half to the lower bands, is not the proper disposition of the matter. We insist that it being the duty of the court below to consider the report of the Commissioner of Indian Affairs, and it appearing from that report that

but one-sixth the known Indians were members of claimant bands, the proper legal conclusion is that only one-sixth the unknown Indians were members of the claimant bands.

3. In stating the account between the Government and the lower bands, the defendants charge the lower bands with this sum of $94,610.44, as shown above. If, therefore, they should succeed in charging the entire sum of $206,353.30 against the claimant bands, they would have credit twice for at least $94,610.44.

To refuse to consider such official reports as evidence is to set a dangerous precedent which, if followed when the Government is a proponent, might entail more serious consequences than those now suffered by the claimants. When we consider that upon the evidence which was once in the Interior Department nearly $95,000 of this sum was charged to the lower bands, as having been disbursed to their identified members, it will appear that claimant bands are charged not only with the payments made to those known to be members thereof, but also to practically all those who could not be identified.

Items III and IV.

These two items are derived as follows:

There was on hand at the time of the Forfeiture Act $104.66, which had been returned to the Treasury, and $122,404.46, in the hands of the department's agents, making in all $122,509.12, remaining unpaid out of the annuities for which appropriations had been made.

This sum was to have been expended in 1862–63. The Forfeiture Act provided that two-thirds of this sum and two-thirds of the annuity for 1864, not to exceed $100,000 in all, should be applied to the payment of damages. It is presumed that at the time of the passage of the Forfeiture Act it was not known just what sum was on hand unexpended, and the purpose was to secure at least $100,000 for the payment of damages. The appropriation for 1864, therefore, was but $50,000 instead of the regular annuity, as that sum added to the $122,509.12 on hand and unexpended would exceed the $100,000 authorized by the Forfeiture Act to be expended in payment of damages.

The defendants admit that $120,220.24 was applied to payment for damages—a sum in excess, as will be seen, of that authorized by the Forfeiture Act to be paid. The balance, $52,184, was expended for purposes not contemplated by the treaty. We have said, and we earnestly insist, that as we are not to consider the Forfeiture Act, and as all those charges were made under its authority, claimants are not chargeable with $122,509.12 remaining unexpended out of the annuities for which appropriations had been made, nor for the $50,000 appropriated in *1863* out of the annuity for 1864.

Item VI.

This item is noted by defendants as being a charge in dollars of $889,354.74. That was the charge made by the Interior Department, but the Court of Claims declined to charge the annuities with the expense of re-

moval, $81,530.03, and therefore reduced the sum named by the defendants to $807,824.71.

This item of $807,824.71 is made up as follows:

For one-half damages being	$1,172,657.92	$586,328.96
For one-half damages being	100,000.00	50,000.00
For one-half subsistence being	13,942.03	6,971.01
For one-half support being	400,000.00	200,000.00
Total	$1,686,599.95	$843,299.97
From which is deducted one-half amount returned to United States being	$70,950.53	$35,475.26
	$1,615,649.39	$807,824.71

Sen. Doc. 68, 55th Con., 2d Sess., Statement No. 10, p 20.

The second item in the table just given entitled "For damages," is incorrectly entitled, as that $100,000 was paid to creditors, and was made a specific charge against claimants' annuities. Having no means of disproving the expenditure of half that sum on claimants' account, we are compelled to admit the correctness of a charge for $50,000, and have done so from the beginning of the litigation. But every other item is denied as being a proper charge against the annuity fund.

No Liability for Support.

First, as to our liability for support: The total charge against the claimants on this account is $280,000, being one half the amount appropriated for all four of the

bands, that is for both the upper and lower Indians. We have discussed this charge fully in our original brief (pages 17–21), showing the error of the court in the statement of its opinion that some of the particular appropriations are in terms made chargeable to the annuities of claimants, while in other instances no mention of annuities is made. We show that the court was misled into making this statement by the incorrect designation of the appropriation act of March 3, 1885, just noted, and that the court had confused the specific restoration of annuities by the act appropriating the $100,000, with appropriations for damages and supports, when, in fact, the appropriation of the $100,000 related alone to debts. But if the court below was not misled by the incorrect designation of the act appropriating moneys to pay debts, is there not, in the statement of the court's opinion, a very strong reason for denying that other appropriations included in this item are chargeable to the annuity fund? By one of the acts—the one appropriating $100,000 for the payment of debts of the four bands—Congress specifically restored the annuities by making that sum a charge against them. In none of the other acts appropriating the other sums which are charged does Congress specifically restore the annuities or use any words to indicate its intention to do so, or in any manner refer to the Forfeiture Act. Is it not significant that in the one instance the annuities were restored, and in the remaining instances they were not restored? Does this not indicate that it was not the purpose of Congress to restore any annuities, except where it should,

by apt words, do so in the act appropriating the amounts?

We have also urged upon the court that the moneys appropriated for support were for the support of those Indians who had removed to their new homes, and we have asked that the court take judicial notice of the official documents to show that the claimant Indians were never removed to any new homes, and therefore do not come within the description of the Indians for whose benefit the acts were passed.

This contention urged in our originl brief may be materially supplemented. By the treaty of 1851 the claimants ceded to the United States all their lands in Minnesota and Iowa, east of a certain line therein designated. This line is shown on the map prepared by the Indian Office in 1897, copies of which are filed. The court will observe, at the northwestern corner of South Dakota, a triangular body of land, from the southeast side of which extends a parallelogram, having the Minnesota River for its centre line. The triangle was not ceded by this treaty of 1851. The parallelogram was ceded, being included in the lands east of the given line. But by Article III, following the article (II) containing the cession, it was recited, as a part of the consideration for the cession, that the claimants should have that parallelogram as their home. In other words, Article II ceded all the lands east of the line including the parallelogram, while Article III ceded back to the Indians the territory within the parallelogram. By a Senate amendment this Article III was stricken out, and a supplemental article added agreeing that the United

States would pay claimants ten cents per acre for the lands within the parallelogram; and by a second supplemental article it was stipulated that there should be set apart some other reservation outside the limits of the cession, it being finally provided that the President might, by consent of the Indians, "vary the conditions aforesaid" if deemed expedient. The ten cents per acre was added to the annuity fund; but the conditions were so "varied" by the President that no other reservation was selected, but the Indians continued to hold the parallelogram as they, of course, had the right to do; and by the act of July 31, 1854 (10 Stat. L., 326), the President was authorized to confirm to claimants forever this very reservation denoted by the parallelogram, in lieu of the reservation contracted to be set apart outside the limits of the cession.

No formal action, however, was taken by the President to confirm the reservation to claimants, though they continued to reside there, no other reservation having been provided for them.

Finally, the treaty of June 19, 1858 (12 Stat. L., 1037), set apart the lands within the parallelogram on the south side of the river as their reservation. By this treaty there was submitted to the Senate the question of the title of claimants to the lands on the north side of the river within the parallelogram. The Senate decided favorably to claimants, and resolved that they be allowed thirty cents per acre for them, which sum was appropriated by the act of March 2, 1861 (12 Stat. L., 237). Thus it was that in 1862, and at the time of the Forfeit-

ure Act, the claimant bands owned the lands on the south side of the Minnesota, within the parallelogram. And thus is shown that they had only to walk, or ride their horses, out of the parallelogram into the triangular tract, a journey of a few hours along the banks of the Minnesota River. That was their "removal"—accomplished by themselves, certainly without Government transportation, and doubtless without the revolution of a wagon-wheel.

Now, let us remember that the Indians had ceded only their lands in Minnesota and Iowa east of this certain line. At the time of this cession they owned a vast region in Dakota. This territory was defined by the treaty of 1867 (15 Stat. L., 505), which recognized one of their reservations, being at Lake Traverse (the triangle), the other at Devil's Lake. Again referring to the map, Devil's Lake Reservation may be seen in the north central part of North Dakota; and just below that reservation are printed the words "Cession of 1872," covering all the territory between and immediately adjacent to the two reservations. This cession of 1872 was finally confirmed June 22, 1874 (18 Stat. L., 167). Thus it is seen that when the parallelogram was cleared of Indians in 1863 the claimants owned the vast territory surrounding the two reservations as well as the reservations themselves; and it was to these reservations and to the territory surrounding them that the claimant bands "removed" after the difficulties of 1862.

But there *were* Indians who *were* removed to "new homes." The reports as shown in our orignial brief

fixed the new homes of those who were removed, at Crow Creek, which, it may be seen from the map, is in the southwest corner of South Dakota, distant from the parallelogram 275 to 300 miles.

Now, we have shown that the appropriations for support were all made for the support of the Indians who had "new homes" (Original Brief, page 19), and that the new homes referred to were at Crow Creek, the occupants being those who were later removed to Niobrara, in Nebraska (Original Brief, p. 20), where they are living today. The Sissetons and the Wahpetons had no new homes. They have lived from the date of the war to this hour at their old homes in North and South Dakota, and no item of history can be found to place them elsewhere during the period when these sums were being appropriated for the support of Sioux Indians "at their new homes, or at any other time.

The Court of Claims did not pass upon the question whether the claimant bands had been removed, and if it should be deemed material by this court to consider that question, it would be necessary to take cognizance of the official documents to which we have referred, and of the several reports of the Commissioners of Indian Affairs for the various years, showing the location of the claimant bands to be within the territory we have described.

On this point we are officially advised as follows:

> "The Sisseton and Wahpeton bands have two reservations—one in the eastern part of the territory, at Lake Traverse, containing 1,241,600 acres,

where are 1,496 Indians, and one in the northeastern part of the territory, at Devil's Lake, containing 345,600 acres, where are 720 Indians, including a few from the "Cut-Head" band of Sioux. These two reservations are provided for in a treaty made with the bands in 1867. These Indians were a portion of the Sioux Indians living in Minnesota at the time of the outbreak in 1862. Many of them claimed to have been, and doubtless were, friendly to the whites during the troubles referred to, and when the removal of the Sioux took place in 1862, as noticed heretofore, under the title of 'Santee Sioux,' they went to the western part of Minnesota and to the eastern and northern parts of Dakota, near their present reservations. (Report Commismissioner Ind. Affairs, 1872, p. 45.)

It is noteworthy, in this connection, that the lower Indians did not claim to own any other lands than those they were compelled to surrender, to which they could have removed themselves, or at least that no such claim on their part was ever recognized by the United States in the making of any treaty or the enactment of any statute.

But the defendants say that the treaty of 1851, under which the annuities were derived, provides for the expenditure of sums for support, and that, according to our own theory, this $200,000 is therefore chargeable. The treaty of 1851 had in contemplation annual expenditure as follows:

First—For agricultural and educational purposes	$18,000
For goods and provisions	10,000
For money annuity	40,000

The total of the annuity being increased by supplemental articles to $73,600, the amount for the purchase of goods and provisions would be increased from $10,000 to $10,823.53, payable annually.

The $400,000 appropriated for support, with one-half of which claimants are charged, was appropriated in sums of $100,000 each in the years 1864, 1865, 1866 and 1867. Thus by the judgment of the court, the annuities are sought to be charged with $50,000 a year for support, when the Indians were entitled to but $10,823.53 for each of these four years, if the treaty of 1851 had remained in force. It is therefore evident that these appropriations for support were not made to carry out the provisions of the treaty of 1851, and that the amounts stipulated for support in the treaty of 1851 were not in contemplation when the four appropriations of $100,000 each were made (with one-half of which our claimants have been charged), making $50,000 for each of these four years, instead of $10,823.58, and therefore that these sums were appropriated just as sums for like purposes for other Indians—not because of any treaty, but in recognition of a universal obligation toward dependent Indian tribes and to carry out the general policy to support Indians who were removed or constrained to remove. And, as we have shown, it was the lower bands only who were removed, and only they who were supported. But, as we have shown, the annuities having been forfeited, there were no annuities against which to make this charge, unless Congress, by express provision of law, restored them to that extent and for that specific purpose.

The treaty of 1851 was not in existence. No one of the acts making these appropriations refers to that treaty in any way; therefore it cannot be presumed that Congress had in mind the treaty or any of its provisions. In short, the law does not make these sums a charge against the annuities, and there is nothing to show, in the least, such an intention on the part of Congress. Therefore, these sums cannot, from any standpoint, be a proper charge against the unpaid annuities of claimants.

In this connection, we call attention again to Section 2097 of the Revised Statutes, forbidding a diversion of the funds from the purpose stated in the treaty under which those funds were derived.

Payment for Damages.

We have urged in our original brief that claimants' unpaid annuities are not chargeable with payments for damages occasioned during war by themselves, and by the troops of the United States, because there is no authority for making such payments.

The defendants say that, one-half of the sums so paid is made "chargeable" in express terms by the Forfeiture Act itself, as well as by Article VI of the treaty of 1858. One-half of the sum so paid is, as we have shown, $586,328.96. That the Forfeiture Act did provide for payment for damages is not to be denied, but it limited the amount of such charges against claimants to $100,000, and contained no provision whatever for the payment of any further damages out of claimants' annuities.

And now that we are not to consider the Forfeiture Act, even the charge of $100,000 authorized thereby cannot be made.

As to the treaty of 1858, which is offered by defendants as authority for the making of further payments for damages, we reiterate the positions of our original brief:

(1) The treaty of 1858 was abrogated by the Forfeiture Act in so far as it imposed any obligations on the United States, and it would be unconscionable to hold that it was not also abrogated in so far as it imposed obligations on the Indians.

(2) The claimant bands were not in amity with the United States, and therefore were not liable for depredations.

(3) Without an act of abrogation the treaty of 1858 became abrogated by reason of the hostility of the Indians.

(4) The provisions of the treaty of 1858, even if they were not abrogated, were not complied with in the method of the ascertainment of damages. That treaty authorized the Secretary of the Interior to pass upon depredations and in all cases to determine the amounts; but these damages were admittedly determined by a commission, appointed under the provisions of the Forfeiture Act, which operated to repeal the treaty of 1858; and the amount was arbitrarily, and without authority of law, evenly divided between the claimants and the lower bands.

It is evident also that the depredations contemplated by the treaty of 1858 were only those for which treaties

with Indians usually provide. It is not to be thought for a moment that the treaty had in contemplation the payment for damages which might result from war.

But it makes no difference whether the treaty of 1858 was abrogated by the Forfeiture Act, for Congress by that act took the matter of damages in its own hands and appropriated $100,000 of claimants' annuities for that purpose. This action of Congress was a positive and final determination of the extent of claimants' liability for damages.

Upon this point we have the opinion of a former distinguished Chief Justice of the Court of Claims, in the case of Love *vs.* Rogue River Indians (29 C. Cl., 332). From the opinion the following is extracted:

> "The international rule which holds a nation responsible for the acts of its members as long as peace continues may be illogical, but it is world-wide that as long as peace continues the individuals of two nations are supposed to be friends and are held to the obligations of peace. * * * When war comes it becomes lawful to kill, capture and destroy; and if by the peculiar circumstances of the case such acts are deemed offenses, it is because they are offenses against the laws of war. When war ceases the conquering power may exact tribute, as Germany did of France, or the United States of Mexico; or it may accord peace without imposing terms, as this Government did at the close of the civil war. But if indemnity is to be exacted, it is as a condition of peace and at the time when peace is established, and not afterward. The United States, at the close of every Indian war, have had

the power to impose terms, and confiscate trust funds, and seize territory, and divert annuities to the indemnification of the Government or of their despoiled citizens, as they did in the case of the Sioux; * * * but if they did not exercise the power, on the contrary allowed a condition of peace and friendship to be restored by a new treaty, or by the tacit revival of a former one, they cannot by retroactive legislation, in conditions of peace, arbitrarily cast a responsibility for acts done in a former war upon an Indian tribe. The court will not construe a statute so as to affect a wrong. * * *

The liabilities of Indians which the judiciary can recognize are such as arose from treaty stipulations, from the obligations of international law, from the terms and conditions which may have been imposed as a condition of peace at the termination of an Indian war, or from a statute which prospectively imposed an obligation upon the Indian tribes as 'domestic, dependent nations.'"

(*Ibid.*, 346, 347 and 348).

It is to be observed, having reference to the foregoing opinion, that the only effort upon the part of the United States to impose terms and confiscate trust funds is to be found in the Forfeiture Act, which the Government now disavows and which we are not to consider in the stating of this account.

It seems preposturous that the treaty of 1858 contemplated the payment of such damages *out of the annuities.* Annuities—there were none in the hands of the Government. There were to be none except for prompt disbursement as the treaty of 1851 provided; and the method of

disbursement provided in the treaty was protected and still further guaranteed by the general statute (R. S., 2097). It is out of the question that any accumulation of annuities was intended, for the treaty creating them provided an annual, immediate disbursement When the charge was made the annuities had been forfeited; and no appropriation to pay damages ever was made a charge against those forfeited annuities except that provided in the Forfeiture Act, against which claimants are now relieved.

As stated by the Court of Claims in the case of Leighton *vs.* The United States (29 C. Cl., 303), with reference to the trade and intercourse act of 1834:

> "It could not be contended by authority or with reason that Congress by the act of 1834 (*supra*) intended to obligate the United States, as guarantor or otherwise, to pay for the loss or destruction of property by Indians engaged in war. But, aside from the liability of the United States, there is nothing in the act indicating an intention on the part of Congress to compel the Indians to pay for losses occurring in war, nor is there any provision in the treaty with the defendant Indians providing for the payment of such losses."

So there is nothing in any of the treaties with the claimant Indians providing for payment of such losses.

In the same case (*ibid.*, 306), the court considering the payment of losses occurring during the Civil War said:

> "So, aside from the lack of obligation to pay war claims arising from international law and the laws of war, the United States have by express statute

set their face against the payment of such claims against the United States.

The Government, therefore, having by express statutes denied to its loyal citizens payment for loss or destruction of property occurring in the war of the rebellion, cannot be held liable, as guarantor or otherwise, in the absence of some express provision of law, to pay losses occurring in Indian wars; and certainly the United States would not apply a different rule to a 'domestic dependent nation,' with whom they were in treaty relations, without the consent of such tribe or nation. The long-established and statutory recognition of the policy of the United States against the payment of claims arising from acts of war could only be disregarded by the law-making powers."

This "long-established and statutory recognition of the policy of the United States" in this particular was "disregarded by the law-making power" as to these claimants, only by the act of forfeiture, now to be itself disregarded.

Item 7—$464,953.40.

As stated by the defendants this is the aggregate of appropriations made under the treaty of 1867. Our own discussion of this treaty in our original brief, pages 21 to 32, needs further elaboration.

The second article of this treaty makes certain concessions to the United States. The third article recites that in consideration of such cessions, of the services rendered by the Indians and of the confiscation of their annuities, the Government grants them a certain reservation. This grant was an idle one *since the In-*

dians were already the owners of the very lands, as afterwards found and admitted by the Government. *They therefore received nothing for any of the things m entioned in Article 3.*

The Commissioner of Indian Affairs, writing upon this subject in his communication of March 22, 1888, said:

> "But what did we give them by this treaty as a reward for their faithful services in which they had imperiled their lives; and in compensation for their annuities, which were confiscated; and for their crops which our troops consumed, valued at $120,000; and for their valuable lands in Minnesota, from which they were driven; and for the right of way for roads through their lands in Dakota, which they ceded to us? What was the valuable consideration given to which we refer as compensation for all their loss and wrong? Simply the reservations in Dakota on which they live, which were theirs already" (H. R. Report No. 1953, 50th Congress, 1st Session, p. 6).

Under the treaty, Article 6, they did receive the amount of this item, but it was *because of their destitution* that Congress promised that it would "in its own discretion from time to time" appropriate such sums as might be deemed necessary to enable the Indians to return to an agricultural life.

For these indefinite promises of Article 6 there was no consideration. There was no reason for them, other than the moral obligation resting upon the Government to care for and advance its wards—an obligation

which is recognized as to all Indian tribes. The appropriations made in view of this obligation, being entirely optional, can be placed in no other class than gratuities. Note the purposes as recited in the amended 6th article to establish local and manual labor schools, to employ agricultural and mechanical teachers, to open and maintain individual farms, and generally to promote the agricultural improvement and civilization of the bands. Then note the purposes to which the several appropriations were applied: The acts cited below direct the expenditure of the amounts provided by them respectively, for goods, provisions, education, medicine, physicians, nursing, implements, seeds, &c. (Act June 27, 1868, 15 Stat. L., 217); (Act March 3, 1869, 15 Stat. L., 315); (Act April 20, 1870, 16 Stat. L., 88); (Act July 15, 1870, 16 Stat. L., 354); (Act March 3, 1871, 16 Stat. L., 563); (Act May 29, 1872, 17 Stat. L., 183).

The remaining acts, nine in number, and shown in statement No. 3 at page 17 of Senate Document 68 (*supra*), appropriating comparatively small sums, include, in terms, *the pay of employes and other incidental expenses at the agencies*—a charge never made against Indian tribes, rich or poor, whether annuitants or not. Such expenses are universally borne by the Government.

It is a fact of history that the claimant bands were, in a large measure, farmer Indians, and that their farms, buildings and improvements were destroyed during the outbreak. Their agent estimated their losses at half a million dollars (Report Commissioner of Indian Affairs, 1863, pp. 291–2). Both the original and amended article

6 declare it to be the purpose of the Government to enable the Indians to return to an agricultural life. *The sum total of all the appropriations made under the treaty of 1867 falls about $30,000 short of the actual losses of the farmer Indians, as stated by their agent.*

But whatever the purpose of the Government, it was but assuming its usual obligation to Indian tribes in making these appropriations. Whether there was any consideration passing to the Government is not important. Untold millions have been paid out of the national Treasury without consideration. We have yet to hear it maintained that a promise made by the United States in a treaty with Indians may be avoided on the suggestion of a failure or want of consideration.

Concerning the moral obligation under which the United States rests toward Indian tribes, it is permissible to cite the following from a report of the Commissioner of Indian Affairs:

> "Can any principal of national morality be clearer than that when the extension and development of a civilized race involve the rapid destruction of the only means of subsistence possessed by the members of a less fortunate race, the higher is bound, as of civil right, to provide for the lower some substitute for the means of subsistence which it has destroyed. * * * We have received the soil from them and we have extinguished their only means of subsistence. Nothing in the history of the United States justifies the belief that either Congress or the country will be wanting in justness or generosity in dealing with the necessities of a

people who have been impoverished that we might be rich. Our national charity has sought the objects of its benefactions at the ends of the earth; Americans will never be wanting in simple justice to helpless dependents at home."

Rep. Comm. Ind. Affairs, 1872, p. 10.

The annuities, it will be remembered, had been forfeited when the appropriations under the treaty of 1867 were made, and there were no annuities against which such sums might be charged. If, in any of these appropriation acts, the sums had been specifically declared charges against the annuities, that would have effected a restoration of the annuities *pro tanto*. The appropriations aggregating this item of charge were based upon the separate promises of the treaty of 1867, and were made for purposes similar to those entertained on behalf of all Indians. Surely it must be clear that none of them was intended to be in restoration of the annuities provided by the treaty of 1851, that none of them were accepted in that view, and that they are therefore not proper charges.

There is nothing in the treaty authorizing the optional appropriations made in pursuance of Article 6 thereof to be made a charge against the unpaid annuities of claimants, nor is there any express provision of law authorizing such charge, as there must be in order to make it, as required by Section 2097 of the Revised Statutes.

The statement in the opinion of the court below that the Senate intended the indefinite promises of amended Article 6 of the treaty of 1867 to be in lieu of the con-

fiscated annuities, finds no warrant in any word of the treaty, or in any agreement or statute. That such construction is impossible is shown by Article 3 of the treaty, providing that the reservation (which claimants already owned) was to be among other things in consideration of the confiscation of their annuities. With these two articles of the treaty before the court, and quoted by it, it is not seen how such an error could have been made. On this subject the defendants deny the title of the Indians to the lands included within these reservations. This denial is not only without evidence to support it, but is made despite the finding of the Commission appointed for the purpose of investigating the title, under the act of June 7, 1872 (17 Stat. L., 281). That Commission, noting in its report that the treaty had been duly ratified by the proper authorities of the Government, and that neither the courts nor the Government could go behind it for the purpose of annulling its effect, said:

> "It appears to us therefore that the Government is estopped by the recitals, provisions, and admissions of the treaty from now claiming that the lands designated in Article 2 were not at the time of the making of said treaty Indian lands in the actual possession and occupancy of said Sisseton and Wahpeton bands, and that it is not now at liberty to controvert or question the right of those Indians or their claim at that time as the owners of the Indian title to all of said territory.
>
> We therefore find and report that the said bands had, at the time of making said treaty in 1867, the rightful title and occupancy of all said lands, sub-

ject to the fee and pre-emption rights of the United States." (Report Com'r Indian Affairs, 1872, p. 120.)

Congress accepted and ratified this report and its conclusions by buying this very land from the claimants, and paying for it, as shown in our original brief on page 26.

In view of this action, it is not possible that there can be any question as to claimants' title, and therefore there can be no doubt that they received, under this third article of the treaty, absolutely nothing for the rights of way ceded, or in lieu of their annuities, and therefore nothing paid under the treaty is a proper charge.

To admit the charges urged by defendants is to hold that in each act of appropriation, the Forfeiture Act was repealed by implication, though there is no repugnancy between those acts and the Forfeiture Act, and the former acts make no reference to the Forfeiture Act.

It is a familiar doctrine that repeals by implication are not favored. The effect of the decisions on this subject may be fairly stated in these words:

A statute is repealed by implication by a subsequent statute, (1) where the provisions of the subsequent statute are clearly repugnant to the former; or (2) where the latter makes new provisions plainly intended as a substitute for the former; or (3) where the later acts

make some reference to the former, indicating the purpose to modify or prevent its operation.

U. S. *vs.* Henderson, 11 Wall., 652.
Wood *vs.* U. S., 16 Pet., 342.
Fabbri *vs.* Murphy, 95 U. S., 191–196.
Crow Dog *vs.* U. S., 109 U. S., 556–570.
Railway Co. *vs.* U. S., 127 U. S., 406–409.
Board *vs.* Lackawanna Co., 3 U. S., 619–624.
Arthur *vs.* Homer, 96 U. S., 137–140.
Red Rock *vs.* Henry, 106 U. S., 596–601.
Chew Heong *vs.* U. S., 112 U. S., 546–549.

In the case last cited it is said in the opinion:

> "But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication, only *pro tanto* to the extent of the repugnancy."

The act of forfeiture destroyed the annuities of claimant bands, except as to the $100,000 which it seized upon for the payment of damages.

If ever afterward Congress should appropriate the entire amount of the annuities, *in settlement thereof*, such act would necessarily repeal the act of forfeiture as to the annuities. If Congress should appropriate any sum, and declare it to be a charge against the unpaid annuities, such act would operate *pro tanto* as a repeal of the act of forfeiture. Acts of the latter description have been passed. One of these appropriated $581,978.37, and in terms made it a charge against the annuities.

The three several acts from which was realized $206,353.30 made the several sums appropriated also a charge against the unpaid annuities. The act appropriating $100,000 to pay debts, one-half of which we admit to be a proper charge, contained the same provision.

Thus by five separate acts of Congress the Forfeiture Act has been partially repealed, apt words being used to effect that purpose. And while, as we have shown, the present jurisdictional act annuls and avoids everything done under the Forfeiture Act respecting annuities, its entire repeal as to annuities is comprehended within that annulment. We have, therefore, six acts in terms repealing the Forfeiture Act, by restoring *pro tanto* the annuities. The acts appropriating sums alleged to have been expended for support, removal and damages, none of them seek to make such sums a charge against the unpaid annuities. If now we shall hold them to be proper charges, such finding would necessarily declare that each of the acts operated to restore the annuities *pro tanto* and *pro tanto* to repeal the act of forfeiture. But they do not repeal it in terms. The necessary result, therefore, would be that by the restoration of the annuities, such as is accomplished by charging any sums against them, the act of forfeiture was, by the several acts in question, repealed by implication. Therefore as to each charge contested by claimants its validity must depend upon this theory of a repeal by implication.

It is significant that none of these acts providing sums for support, removal and damages, contains any reference to the annuities; none of them is repugnant to the

act of forfeiture; none of them was passed as a substitute for it; none of them even refers to it.

Thus all claims for moneys paid for supports or for damages, or under the treaty of 1867, are shown not to be properly chargeable.

The Effect of Sections 2097 and 2098, Revised Statutes.

Having like application to all contested charges are the provisions of Sections 2097 and 2098 of the Revised Statutes. Section 2097 enacted July 26, 1866, provides that the funds of Indians shall not be paid out except as stipulated in the treaty with them, or upon an express statute. The treaty of 1851, establishing the annuity fund, had in contemplation annual expenditures for certain purposes. The Government had no right to apply either a smaller or a larger sum for any of the purposes provided in the treaty of 1851. If it provided any sum not in contemplation of the treaty of 1851, and not in pursuance of its terms, as we have already shown, such sum would necessarily fall under the head of gratuities. If it provided any sum since the date of the forfeiture act which, by the act of appropriation, was not specifically made a charge against the annuities, no such charge can now be made. Claimants are not, therefore, chargeable with sums paid for support.

Particularly is it so that when it was optional with Congress whether it would provide any sums, and how often it would provide them, such sums cannot be properly chargeable against annuity funds. The mere fact

that Congress reserved the option of determining these two questions makes any appropriations under the treaty of 1867 gratuitous.

Section 2098 provides, as we have shown hereinbefore, that no annuity funds shall be taken for the payment of depredations that may have been committed. This would certainly seem to have peculiar application to the charge made on account of damages, and to be conclusive against the propriety of that charge.

These two sections must be considered in connection with the jurisdictional act, and define the words "properly chargeable."

The questions whether the Indibns were removed and whether they were supported are not necessarily for determination if the court shall declare an act upon the theory advanced by us that the unpaid anuulties are chargeable only with such payments, since the date of the forfeiture act, as have been made specifically chargeable against them by some express provision of law or by some treaty or agreement.

The question as to the amount to be charged against the unpaid annuities of claimants out of the $206,353.30 paid to scouts and soldiers of the four bands, whether it shall be one-half as the court below charged or one-sixth, as we contend, may be determined by this court if it take judicial cognizance of the official reports made to Congress, they being the only evidence; also whether, in view of such undisputed official reports, the legal conclusion is a proper one, that the fund authorized to be paid to members of the four bands shall be equally divided between the said bands.

Summary.

To briefly summarize, it is insisted on behalf of the claimants—

1. That the jurisdiction of this court depends alone upon the act approved June 21, 1906 (Record, p. 2), authorizing it to award final judgment for the balance due claimants for any annuities which would be due to them under the treaty of July 23, 1851, and to determine the said balance as if the act of forfeiture of the annuities of said ~~bands~~ tribes had not been passed, setting off against such balance as may be found all payments or other provisions for the bands, or for any members thereof by the United States since the act of forfeiture was passed, which constitute proper charges against the unpaid annuities.

2. That the charge, item 3, of $122,509.12, being the balance of the annuities appropriated but unpaid at the date of the Forfeiture Act, and item 4, being a charge of $50,000 advance annuity appropriated by the act of February 16, 1863, do not constitute proper charges against the unpaid annuities, for the reason that they were paid out for damages under the authority of the Forfeiture Act, which we are not to consider.

3. That the unpaid annuities are not chargeable with one-half the amounts paid to scouts and soldiers of the four bands (item 5), for the reason that the only evidence as to the extent of the participation by claimant bands in the amount paid to scouts and soldiers under the acts referred to establishes the fact that only one-sixth the

total amount of $206,353.30 was paid to members of claimant bands.

4. That the unpaid annuities are not chargeable with one-half the amount expended for support, or one-half the amounts expended for damages, being the 6th item of the findings of the Court of Claims, amounting to $807,824.71.

The sums charged for support are not chargeable, because—

A. There is no evidence that the sums appropriated for support were applied to the support of the claimant bands.

B. The sums alleged to have been paid for support of claimant bands were not appropriated in contemplation of the provisions of the treaty of 1851, but in pursuance of the general and well-established policy of the Government to contribute to the support of Indian tribes without regard to their annuity rights.

C. It appears from the reports which have been cited that the sums appropriated for support were applied to the Indians who had been removed to new homes, and that the claimant bands had not been so removed and had no new homes.

The sums paid for damages are not chargeable against the unpaid annuities, because—

D. The treaty of 1851 contains no provision for payment for damages.

E. The treaty of 1858, which contains a provision for payment for depredations, had not in contemplation

the payment of an indemnity or payment for damages occasioned during the progress of a war.

F. The treaty of 1858 was abrogated by the Forfeiture Act.

G. The treaty of 1858 was made in contemplation of the Trade and Intercourse Act of June 30, 1834, which establishes a liability only for depredations committed during a period of amity; and the claimants were not in amity.

H. The treaty of 1858 was abrogated by hostility.

I. The treaty of 1858 stipulated for payment for depredations as distinct from damages resulting from war.

J. The treaty of 1858 agreed to pay for depredations the amounts to be determined by the Secretary of the Interior; and the amount now sought to be charged for damages was not determined by the Secretary of the Interior.

K. Section 2098 expressly provides that the annuity funds of Indians are not to be charged with payments made on account of depredations past or future.

L. Whether the treaty of 1858 was abrogated or not Congress took into its own hands to determine the extent of the claimants' liability for damages, and that was a settlement of the question beyond dispute. This maximum liability was fixed by the Forfeiture Act at $100,000. But being so fixed by the act of forfeiture, which we are not to consider, even that charge is eliminated.

5. That the charge of sums paid under the treaty of 1867, set out in item 7, is not a proper charge against the annuities, because—

A. The said sum was appropriated at the option of Congress and in pursuance of indefinite promises, and falls, therefore, within the classification of gratuities.

B. The sums so appropriated were applied in large measure to purposes common to all Indian tribes, for which charges are not made against the funds of the tribes.

C. The appropriation of the sums which aggregate the total of this item was made in recognition of the moral obligation of the United States, which is due to all its Indian wards.

It was not made in consideration of the forfeited annuities. The only thing purporting to be given in consideration of the forfeited annuities *was the reservation which already belonged to the claimants.*

It is not authorized by the treaty of 1867, and there is no subsequent treaty or statue authorizing such charge.

And finally, as affecting all the charges contested by the claimants—

A. That they were not made in pursuance of the treaty of 1851, and that the acts appropriating the sums for the several purposes made no reference whatever to the Forfeiture Act, were not repugnant to it, and did not therefore repeal the Forfeiture Act by implication to any extent.

B. That each of said charges sought to be made by the defendants is forbidden by Sections 2097 and 2098 of the Revised Statutes, and none of them has been authorized in any subsequent treaty or by any express provision of any later statute.

C. That by a number of appropriation acts the sums appropriated were specifically declared to be charges against the annuity funds, and that the omission to make these several contested items a charge against said annuities, and the omission to refer to the Forfeiture Act of 1863, are clearly significant of the purpose of Congress that the sums so appropriated should not be charged against the unpaid annuities of the claimant bands.

Recurring to the statement in the opinion of the court upon which it based its refusal to charge the claimant bands with $25,472.30 paid to creditors (which is the subject of the third assignment of error by the defendants), it would seem that if the court had applied to the other items the same principle therein enunciated its opinion would have been in exact accordance with that entertained by claimants' counsel and presented in these pages.

The statement of oginion is in these words:

> "This appears to us to be a transaction entirely independent of the account under consideration, and in no way connected with the annuities provided for by the treaty of 1851, hence not a proper charge against the claimants in this case."

That is the theory upon which claimants base their

objections to all the charges made by the Court of Claims of which they complain, save and except the $100,000 appropriated by the forfeiture act, which claimants say is not properly chargeable because that act is not to be considered in the stating of the account

The correct statement of the account, following the plan adopted by the Court of Claims in item 8, is as follows:

Credits.

By fifty installments of $73,600, treaty July 23, 1851		$3,680,000.00
By amount allowed to chiefs for removal and subsistence by said treaty		275,000.00
By amount allowed to chiefs for manual labor schools, etc		30,000.00
		$3,985,000.00

Debits.

1. To twelve installments of annuity appropriated under the treaty of 1851 prior to the outbreak, $883,200; less returned to Treasury, $104.66; less retained by Department, $122,404.46	$760,690.88	
2. To amount paid to chiefs for removal and subsistence and for manual labor schools under the treaty of 1851	305,000.00	
3. To one-sixth amount paid to scouts and soldiers of the four bands	34,392.22	

4. To amounts paid under agreement of December 12, 1889	581,978.37	
5. To one-half amount paid for debts	50,000.00	
		1,732,061.47
Balance due claimants		$2,252,938.53

The Doctrine of Surcharging and Falsifying an Account Stated.

Counsel for the Government has stated that "The account between the United States and the claimants was referred to the Court of Claims in order to afford the claimants an opportunity to surcharge and falsify."

It was not the object of the Jurisdictional Act to afford an opportunity to surcharge and falsify any account. The manifest contention is that the statements of account by the Interior Department, contained in document 68 (*supra*) constitute an account stated. No account set up by the Interior Department in that document is an account stated. There can be no surcharging and falsification without there has been an "account stated." The doctrine of surcharging and falsifying rests specifically upon omitted credits and wrong charges, and these can exist only in the presence of an account stated.

An "account stated" is an agreement between the parties who have had previous transactions of a momentary character, when all items of account representing such transactions are true and the balance struck is cor-

rect, together with a promise, expressed or implied, for the payment of such balance. These elements are all necessary to an account stated, and such conditions must exist between parties before the doctrine of surcharging and falsifying can apply. It is manifestly not possible to supply omitted credits or correct wrong charges in the absence of an account stated. So that the doctrine discussed by counsel on the other side is not applicable to this case.

It is well settled, for instance, that an infant cannot be charged under an account stated, even for necessaries. So there can be no account stated between a guardian and a ward until the ward has attained his majority. Counsel for the defendants seem to give no weight, in their learned discussion in endeavoring to apply the doctrine that claimants cannot surcharge and falsify, to the fact that any account stated by the Interior Department against the Sisseton and Wahpeton Indians is subject to the doctrine pertaining to the relation of guardian and ward, and not to that pertaining to persons competent to contract, and dealing at arm's length.

That the Indian is the ward of the Government has been decided in many cases; notably, United States *vs.* Kagama, 118 U. S., 385, cited on pages 30–31 of appellant Indians' first brief herein.

The nearest approach to an account stated between the appellant Indians and the United States is found in Article III of the agreement of 1889, approved by act of Congress of March 3, 1891 (26 Stat., 1037). That article provides as follows:

ARTICLE III.

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people, when at war with the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been wrongfully and unjustly deprived by the operation of the provisions of an Act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An Act for the relief of persons for damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians"; said sum being at the rate of eighteen thousand and four hundred dollars per annum from July first, eighteen hundred and sixty-two, to July first, eighteen hundred and eighty-eight, less their pro rata share of the sum of six hundred and sixteen thousand and eighty-six dollars and fifty-two cents, heretofore appropriated for the benefit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians, as set forth in report numbered nineteen hundred and fifty-three, of the House of Representatives, Fiftieth Congress, first session.

The United States further agrees to pay to said bands of Indians, per capita, the sum of eighteen thousand and four hundred dollars annually from the first day of July, eighteen hundred and eighty-eight, to the first day of July, nineteen hundred and

> one, the latter date being the period at which the annuities to said bands of Indians were to cease, under the terms of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, aforesaid; and it is hereby further stipulated and agreed that the aforesaid sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, due the first day of July, eighteen hundred and eighty-nine, shall become immediately available upon the ratification of this agreement.

Thus it will be seen that the account between the Government and appellant Indians, agreed to in 1889, shows that the net amount due on account of the said scouts and soldiers of said bands of Sisseton and Wahpeton Indians was $342,778.37. This amount was arrived at as follows: It was found that the scouts and soldiers of said bands amounted to one-fourth of the total number of the bands (Rep. No. 1953, cited *supra*). One-fourth of the annual annuities of $73,600 is $18,400. It was found that 27 instalments of the unpaid annuities had accrued up to that time, making the sum due the scouts and soldiers $496,800. It was also found that the total amount of payments that had been made to or for said bands or to or for any members thereof since the date of the Forfeiture Act, which were then considered by Congress proper charges against the unpaid annuities of appellant Indians, was $616,086.52, and that it was proper to charge one-fourth of this amount, namely, $154,021.63, against the one-fourth of the annuities thus

restored, leaving the net balance stated in that agreement of $342,778.37.

The said agreement not only provided for the payment of this amount, but also for the payment of thirteen more instalments of $18,400 per annum to the end of the annuity period. This agreement, however, was not ratified until three years later, by act of Congress of March 3, 1891 (26 Stat., 1037), therefore the act of ratifying this agreement appropriated, in addition to the $342,778.37, three more of the annual instalments to be paid under the said agreement, amounting to $55,200, making a total of $397,978.38. Said act, however, appropriated $3,000 less than said amount, which deficiency was later appropriated (Senate Doc. 68, 55th Cong., 2d Session, p. 18, Statement No. 6). The remaining eleven instalments of $18,400 were paid each year thereafter to the end of the annuity period in 1901, as provided in said agreement ratified by the act of 1891, making a total payment to said bands on account of said scouts and soldiers of $581,978.37.

It will be seen that under said agreement and the acts of Congress carrying the same into effect, one-fourth the total amount of the unpaid annuities was restored, and that one-fourth of the total payments which had been made to or for said bands, or to or for any members thereof, which were deemed proper charges against said unpaid annuities, was at that time deducted therefrom, making $581,978.37 the net amount of one-fourth of the unpaid annuities due, as stated above, leaving three-fourths of the amount then deemed to be proper charges

against the unpaid annuities to be charged if in the future the remainder of said annuities should ever be restored.

It will be noticed that at the end of the annuity period, in 1901, Congress passed the first jurisdictional act looking towards the restoration of the remainder of said unpaid annuities. Upon the failure of relief under said act, as set out *supra*, and in our original brief, Congress passed the last jurisdictional act of June 21, 1906, which restored in full the remaining three-fourths of the unpaid annuities, subject to charges or set-offs proper to be made against the same.

We have contended in our original brief, and in this our reply brief, that some of the charges made against appellant Indians under the agreement of 1889, to-wit: the amounts paid under the treaty of 1867, and the gifts, were not proper charges against the unpaid annuities, and we still so contend; but if the court should hold that the contention of Government counsel that the doctrine of an "Account stated," and the doctrine applicable to surcharging and falsifying the same, pertain in this case, then we submit that the balance of the annuities now restored, which is three-fourths of all the unpaid annuities, cannot, in any event, be charged with a greater amount than three-fourths of the $616,086.52 found to be the total charge against all of the unpaid annuities in the account stated, if it be such, in the agreement of 1889.

As shown above, the agreement of 1889 determined that 26 instalments were due up to 1888, and 13 instalments thereafter, making 40 in all. Three-fourths of

the annual annuity of $73,600 which is restored under the last jurisdictional act is $55,200 per annum, which, for forty years, would amount to $2,208,000, from which should be deducted three-fourths of $616,086.52—$462,-064.89, leaving a net balance due of $1,745,935.11; or, to make the calculation in a different way, we have seen that under such an account stated there was paid under the agreement of 1889 $581,978.37, being the net amount due on account of one-fourth of the annuities. The present jurisdictional act restores the remainder of the annuities; therefore there would be due now, under that account, three times what was then paid, namely, $1,745,935.11.

There has been nothing paid to or for said bands, or any members thereof, since the agreement of 1889, which the Government contends is a proper charge against said unpaid annuities, except an additional sum of $206,-353.30 for scouts who were not included in the agreement of 1889, but this amount, as shown from the three several appropriation acts cited *supra*, was appropriated for the scouts and soldiers, not only of appellant bands, but also for the two lower bands of Sioux. The court below, looking at the face of these acts, held that one-half of this amount should be charged to appellant Indians and one-half to the lower bands. It should be noted in this connection, however, that all of the $581,-978.37 paid to the scouts under the agreement of 1889 was paid to the scouts and soldiers of the two upper bands of claimants.

Therefore, we submit that in the light of this fact alone it would seem that but few of the upper bands

(appellant Indians), who were entitled to be so paid, could have been overlooked at the time of that settlement, and that hence a very large number who participated in this last payment must have been scouts and soldiers of the lower bands for whom no other provision had been made.

As contended in our original brief, and in this reply brief, *supra*, we should be charged with only one-sixth of this amount, or the sum of $34,392.21. Therefore, if the court holds with us that this view is correct, appellant Indians, under this account stated, would be chargeable with this $34,392.21, and entitled to a judgment for $1,711,542.90.

But, if the court should hold that appellant Indians are chargeable with one-half this amount, then they would be chargeable with $103,176.65, and entitled to a judgment for $1,642,758.46.

But we repeat our contention that a proper construction of the jurisdictional act requires that the unpaid annuities of appellant Indians shall be diminished only by such sums as, by the terms of treaties or Congressional enactments, are made chargeable against the same, and for the reasons set out in our original brief and in this brief, the claimants are entitled to a judgment for $2,252,938.53.

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ADDENDA.

We desire to ask the attention of the court to the fact that if the settlement under the agreement of 1889 should now be corrected under the terms of the present jurisdictional act, so as to relieve claimants of the charge of $467,457.25 made under the treaty of 1867, and the charge of $70,000.00 appropriated May 16, 1874, (none of which is chargeable, as held by the court below, Rec., page 11), and the $35,637.77, which was for gifts (Exhibit "E," Defendants' Supplemental Brief, pages 27–28), for the reasons given *supra*, then claimants would be entitled to a judgment, including the above sums, in addition to the $1,711,542.90, balance due under said agreement, amounting to $2,284,637.92, less two corrections in favor of the United States under said agreement.

The first correction is for $24,690.88, which is the difference between the sum of $760,690.88, admitted under Debits (Item 1, page 48, Claimant's Reply Brief), and the sum of $736,000.00 for annuities charged under the agreement of 1889; and the sum of $7,008.50, being the difference between the sum of $42,991.50 charged under said agreement and the sum admitted under Debits (Item 5, page 49, Claimant's Reply Brief), making a total set-off or credit of $31,699.38 to be deducted from the total sum of credits, leaving $2,252,938.53, being the exact sum for which claimants ask judgment.

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